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Supreme Court of the United States

OCTOBER TERM, 1926.

No. 357.

ALBERT OTTINGER, as Attorney General of The State of New York,

Appellant,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

BRIEF ON BEHALF OF APPELLANT ALBERT OTTINGER AS ATTORNEY-GENERAL.

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Supreme Court of the United States

OCTOBER TERM, 1926.

No. 357.

ALBERT OTTINGER, as Attorney General of The State of New York,

Appellant,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

BRIEF
ON BEHALF OF THE APPELLANT

This case comes up on appeal from the United States District Court of the Southern District of New York.

On June 1, 1923, appellee was charging $1.15 per thousand cubic feet for gas of a standard of 580 British thermal units. This rate was fixed by the Public Service Commission and was acquiesced in by appellee in October, 1922 (pp. 11-12). On June 2, 1923, Chap. 899 of the Laws of 1923 fixed plaintiff's rate at $1.00 and raised the standard of gas it was required to furnish to 650 British thermal units (p. 13). Appellee immediately obtained a preliminary injunction against both rate and standard, so that it has tried neither. The Court below sustained all its contentions in a decree entered on May 7, 1925 (p. 322). From that decree, this appeal has been taken.

The errors assigned are numerous (pp. 327-351). All of them will be relied upon.

Certain of these assignments are to the general conclusions of the Court below as to the unconstitutionality of the statute (Assignments of Error Nos. 1, 2, 44, 45, 53-56, 58, 63-71).

The balance of the assignments fall under a few heads. Appellant contends:

1. That the rate base taken by the Court below is excessive in that:

(a) The land was taken at too high a value, and that excessively valuable land was included which should long ago have been sold (Assignment of error No. 14).

(b) The so-called "original cost" found by the Master and approved by the Court below is too high in that it inclues many items not properly included in "original cost of construction" (Assignments of Error Nos. 26, 28, 29, 31-33).

(c) The Court's fair value too nearly approximated an excessive reproduction cost undepreciated and improperly included properties not used and useful and failed to deduct for depreciation (Assignments of Error Nos. 34-40).

(d) That the Court's so-called reproduction value is excessive in that: (1) The appraisal of mains and services is too high; (2) That no depreciation was deducted (Assignment of Errors No. 15, 16, 19-25).

(e) No diminution of valuation is made because of deterioration, inadequacy or obsoles-

cence. This in spite of the fact that the plants of appellee have been to the extent of $11,800,000.00 built out of a reserve for contingencies, including wear and tear, which reserve has been built up by charges to cost of operation (Assignments 15, 19-25, 34, 35, 41, 59).

(f) The Court erred in including the antequated 14th and 42nd Streets plants which were scrapped in October, 1923, in its appraisal of appellee's property as of June 1, 1923 (Assignments of Error Nos. 3, 6, 14, 26).

(g) The allowance of $9,000,000.00 for going value or any separate allowance is entirely unjustified in view of the history of appellee (Assignment of Error No. 18).

(h) The allowance for working capital is far too high and should not exceed $4,000,000 (Assignments of Error Nos. 17, 20, 27-30).

(i) The valuation of jointly-used facilities, assigned to appellee is too great and the allocation of such property is unfair (Assignment of Error No. 37).

2. That the Court has found operating expenses which are unjustified by careful analysis in that:

(a) It has not taken as a measure of production costs the costs at the most efficient and up-to-date plant (Assignments of Error Nos. 5, 7, 8, 13).

(b) It has not sufficiently decreased distribution expenses to allow for the large amount of work done by the officials of the appellee for its affiliated companies (Assignments of Error Nos. 9, 11, 13).

(c) It has included in the tax item taxes on the 14th and 42nd Streets plants (Assignment of Error No. 10).

(d) The Court should not have indicated that the expenses of rate litigation should be included in operating costs (Assignment of Error Nos. 46, 50, 61, 62, 65, 67).

3. That the Court should have found constitutional both the rate and the standard; the statute should have been construed as severable, however, and each portion, that fixing the rate and that fixing the standard, should have been judged separately. If the standard provision should be found unconstitutional in and of itself, the rate should none the less have been upheld, and vice versa.

4. The Court should not have held that the statute in question violated Article 1, Sec. 10 of the Constitution, in that it impaired a "contract" between appellee and the State of New York, alleged to be contained in the order of the Public Service Commission of October 1, 1922, and an acceptance with reservations by appellee thereof (Assignments of Error Nos. 51, 62).

5. The Court should not have held that the statute would be unconstitutional if appellee did not receive a return of 8 per cent. (Assignments of Error No. 42, 60).

6. The Court should not have declared the statute unconstitutional when there had been no experimentation under it (Assignments of Error Nos. 43, 57).

Appellee and its Rates.

The history of the formation of appellee is succinctly stated in Willcox v. Consolidated Gas

Co., 212 U. S., 19, where the Court said (pp. 42, 43, 45, 46):

> "Prior to 1884 there were seven gaslight companies in New York City, each operated under separate charters, granted at different times between the years 1823 and 1865 or 1871. They each had the right to use the streets of certain portions of the city for the purpose of laying their mains and service pipes in order to furnish gas to the city and the citizens. * * *
>
> "In 1884, by chapter 367 of the laws of that year, authority to consolidate manufacturing corporations was granted upon conditions mentioned in the act. The directors of the corporations proposing to consolidate were to make an agreement for consolidation, embracing, among other things, the amount of capital and the number of shares of stock into which it should be divided, the capital not to be in amount more 'than the fair aggregate value of the property, franchises and rights of the several companies to be consolidated.' The agreement was not to be valid until submitted to the stockholders of each of the companies and approved by two-thirds of each. The constituent companies, which were afterwards consolidated under their agreement, and pursuant to the act mentioned, were six in number, the seventh, The Mutual Company, withdrawing. The companies agreed upon the valuation of their property, which was to be paid for in the stock of the consolidated company, and the original stock held by the stockholders of each company was surrendered to the consolidated company. * * *
>
> "The evidence shows that from their creation, down to the consolidation in 1884, these

companies had been free from legislative regulation upon the amount of the rates to be charged for gas. They had been most prosperous and had divided very large earnings in the shape of dividends to their stockholders, dividends which are characterized by the Senate Committee, appointed in 1885 to investigate the facts surrounding the consolidation, as enormous. The report of that Committee shows that several of the companies had averaged, from their creation, dividends over sixteen per cent., and the six companies in the year 1884 paid a dividend upon capital which had been increased by earnings, as in the case of the Manhattan and the New York, of eighteen per cent., and, had it been upon the money actually paid in, it would have been nearly twenty-five per cent."

In 1905 a legislative investigation was held by the so called Stevens Committee for which Hon. Charles E. Hughes acted as counsel. As a result the rate was reduced to 80 cents per M by Chapter 125 of the Laws of 1906. This statute was attacked without success in the Willcox case (supra), and the 80 cent rate continued until set aside by the District Court in its decree in Consolidated Gas Company v. Newton, 267 Fed., 231, on August 11, 1920. The 80 cent rate had proved profitable to appellee, at least up to 1917. It had shown good earnings even after deducting as much as ten cents per M for a reserve for "renewal and contingencies" which had resulted in an accumulation of about $12,000,000.

Judge Hand in his decree in August, 1920, limited the company to a rate of $1.20 until March 1, 1921. This he considered a liberal rate and "took all doubts in favor of the plaintiff's claim."

Consolidated Gas Co. v. Newton, supra, p. 271.

From 1906 to March 1, 1921, therefore, the rates charged by the company were regulated either by the State or by the Court. On the latter date, March 1, 1921, Judge Hand refused to extend the limitation he had placed on the rate and from that date appellee was for a time free from all regulation. As Judge Hand said, "The public was exposed" then "to its (the company's) estimate of what a fair rate should be" (Consolidated Gas Co. v. Newton, supra, p. 270). It fixed its own rate of $1.50 per M from that date until August 1, 1921. On the latter date it reduced its rate to $1.25 per M where it remained until October 1, 1922, when in pursuance of an order of the Public Service Commission it was reduced to $1.15 per M, where it still remains.

After the 80 cent statute was sustained in 1909 the company not only justified the rate in its operations but proved its title to be considered "the most favorably situated gas business in America" (Willcox v. Consolidated Gas Company, supra, p. 49).

Its rate in 1914 was lower than that charged in many other large cities, as indeed it should have been. Its density of consumption was far greater than in any other city and it could afford to distribute gas more cheaply.

In Chicago the People's Gas Light Company in 1914 was charging 80¢ gross. Today Mr. Insull's Chicago company is content with a rate of $.95 per M while the Consolidated charges $1.15. Thus has eighteen months of lack of regulation put the consumers of appellee at a disadvantage compared with the next largest city in the country. That the Chicago situation is not abnormal is revealed by considering the rates in many

less favorably situated cities. A summary of the rates in several cities with the consumption per mile of main in the years 1914 and 1923 as shown in Brown's Directory of Gas Companies follows:

CITY	Rate in 1914	Rate in 1923	Increase Amt.	Increase Per-centage	Sales per mile of Main 1914	Sales per mile of Main 1923
New York (Consolidated Gas Co.)	$ .80	$1.15	$ .35	44	19,653	23,851
Chicago	.80	(2).95	.15	19	———	9,161
Philadelphia	1.00	1.00	none	—	6,410	10,729
Washington	.85	1.00	.15	18	5,125	8,692
Denver	.80	.95	.15	19	3,381	5,665
Rochester	.95	(1)1.00	.05	5	4,276	7,436
St. Louis	.80	(1)1.00	.20	25	5,306	6,774

(1) Minimum charge 50¢.

(2) Plus minimum charge.

It shows a challenging situation. While smaller, less favored companies are content with increases since 1914 of 25% and less in rates the Consolidated, most favored of all, has obtained 44% and the courts have declared an increase of 25% to be confiscatory.

The Challenge contained in the Rulings of the Court Below.

It is arresting to learn that the Consolidated Gas Company has won its way to judicial recognition of its right to a higher rate for gas than that satisfactory to smaller companies. It is even more arresting to examine the rates and the return of appellee during the period when it was free to fix its own rates.

It can be assumed that when a company fixes its own rate it will fix one that is amply compensatory. Obviously it would not allow its property to be confiscated. It is equally obvious that it would exact a rate which would give it a fair return or more. Our entire system of rate regulation is based on the assumption that public utilities if not restrained will in all human probability charge more than a fair rate.

Therefore we can learn from an examination of

the rates of appellee fixed while free from regulation what it considered a fair or indeed more than a fair profit.

On March 1, 1921, appellee as we have said fixed a rate for itself of $1.50 per M cubic feet of gas. On August 1, 1921, it voluntarily reduced its rate to $1.25 per M (Report to P. S. C., 1921). This very reduction emphasizes the more than compensatory character of the rates charged theretofore, namely $1.20 during January and February and $1.50 from March to August. The report to the Public Service Commission for that year shows that on the basis taken by the Master the company had a return available for profits of $4,404,000 or 22.7 cents per thousand cubic feet (a). During 1922 the rate was $1.25 for the first nine months and $1.15 for the last three months. Prices were of course falling rapidly and the results exceeded those of the prior year. The amount available for return was no less than $5,935,000 (b) or 29 cents per M.

The average of the two years gives profits of $5,170,000 per year or of 25.8 cents per M.

This amount the company itself certainly considered more than compensatory.

Now let us compare with this the findings of the Court below and we will see that this amply compensatory profit is found to be not only not compensatory but actually confiscatory.

The Court below has found a rate base as of June 1, 1923 of $134,101,738 and has said that anything less than an 8% return thereon would be confiscatory (Findings 102 and 107, (pp. 201, 203) Eight per cent. on $134,101,738 is $10,728,000 or 45

(a) Calculated from 1921 report to Public Service Commission, (in evidence as Ex. 51, but not printed) on the basis described in note (b).

(b) This amount is calculated from Exhibits 813, 815, pp. 2320, 2328, fols. 3326, 3327. It excludes from expenses return on investment paid to affiliated companies so that the figure will be comparable with those used by the Master. No deductions from operating or distribution expenses are made.

cents per M. In other words, though 26 cents profit per M was considered by the company amply compensatory the Court finds that anything less than 45 cents per M, or nearly twice as much, would be confiscatory.

The importance of these figures lies in the fact that they constitute a challenge to the theories of rate making which are said to have emanated from this Court and particularly to the application of those theories which the Court below has made. It seems quite plain that a theory of rate making needs drastic examination when it can be applied to declare that a return with which a utility is satisfied and which is above that of other companies less favorably situated is not only not compensatory but even if nearly twice as high would still be confiscatory.

If the Court below is correct in its application of the principles which this Court has laid down the fact may as well be faced that the police power of the state to regulate rates has been wiped out. The present rate of $1.15 per M though accepted by the company and yielding them on the property used, according to their sworn reports $7,085,000 in 1923, $7,278,000 in 1924 and $6,900,000 in 1925 is alike confiscatory along with the rate fixed by the statute and a simple application to the District Court will upset the existing rate.

With this situation in mind we believe we are justified in asking this Court to give the most careful attention to the doctrines of the Court below, to its findings and to all the particulars of the case at bar and of the other two cases which will be argued with it.

How the Court Below has Fallen into its Egregious Errors.

The Master complains that this Court has not laid down sufficiently definite rules for his guidance saying among other things:

> "It is apparent * * * that even in this Court of last resort there is as yet no unanimity on the subject of how present value is to be ascertained" (p. 89).

There is one rule, however, which is of general acceptance as a fundamental in rate fixing and rate review. This rule is that the issues which underlie judgments as to the sufficiency of rates cannot be determined by "the application of any artificial formula" (Judge Hughes in Brooklyn Borough Gas Co. v. Public Service Commission, P. U. R., 1918, F., 335, 347), that each case must be determined on its own facts and that consideration must be given to everything which might have a bearing on the subject (Smyth v. Ames, 169 U. S., 466).

This is the rule to which the Master and the Court below have apparently given no attention. They have duly found what they call original cost to be $99,000,000 (Finding 96, p. 199). They have duly found what they consider cost to reproduce with no deduction for depreciation as $162,000,000 (Finding 80, p. 190). They have found a present value in between but much more near cost to reproduce of $134,000,000 (Finding 104, p. 202).

What "artificial formula" was used to arrive at this sum does not appear. All we know is that the result coupled with an 8% return finds that this company needs a net operating revenue of nearly $11,000,000 to escape confiscation when in fact it

admits satisfaction with less than $5,070,000 which is the average earned in 1921 and 1922.

To find the Court's errors it is necessary to examine the situation of this company rather carefully.

The Consolidated Gas Company not only makes and sells gas. It is a holding and supervising corporation which owns, controls and through its various subordinates operates all of the gas and electric corporations in the counties of New York, Bronx, and most of Westchester and Queens. The territory served covers many square miles and includes upwards of three million inhabitants. Of all these companies the Consolidated as a gas company has the richest territory. Comparing it only with the companies in Manhattan, Bronx and Queens on the transfer of gas system, Consolidated has only 1008 miles of mains out of 1935 miles or 52% yet its sells 24 billion feet of gas per year out of a total of 37 billion or 64% and has 576,189 consumers out of 936,754 or 60%. It sales per mile of main are 24,333 M cubic feet as against 17,484 for the system (a).

This enormous density of consumption should of course give it an advantage over every other company in distribution costs. Judge Hough in the Willcox case went so far as to say that it cost the Consolidated nothing to pass through its mains the extra 3,000,000 M cubic feet which it purchased from other companies (Consolidated Gas Co. v. N. Y., supra, 863). We shall see that this advantage, though it must be gained, is not apparent. Indeed the Consolidated apparently does not do so well as its other system companies nor nearly so

(a) Figures from Annual Reports of System Companies to Public Service Commission. May also be calculated from Woods table (p. 1112, fol. 1649) and his testimony (R., p. 1105-1108) Cf. Consolidated v. Newton, supra, p. 245.

well as the comparatively microcopic Kings County Lighting Company whose case is now before this Court.

Similarly this great output should reduce the investment per unit of production. With such an output surely one would think that the cost of plant would be reduced to a minimum. A great plant with all modern appliances economically built up through more than one hundred years of experience on the cheapest possible land surely could be expected and should result in a lower rate base. Yet as we shall see such is not apparently the case. The investment per unit of output is apparently extremely high, higher than that of many less fortunate companies, twice as high as that of the Brooklyn Union Company and more than twice as high as that of the Mutual Company which it recently purchased and which operated in Manhattan in the same territory as that occupied by the Consolidated.

Why is it that both the apparent investment and the apparent distribution costs are so much higher than could reasonably be expected? The answer lies partly in the excessive value of Manhattan real estate and partly in the fact that the Consolidated not only makes and sells gas but operates and supervises many other companies who make and sell gas and electricity. How much property is used for all the companies is known. How much it costs to distribute the gas to the consumers of all the companies is known. The percentage of the total property used by the Consolidated is not known but is estimated. The estimates are solemn but none the less estimates. Similarly what it costs to distribute the gas to the Consolidated consumers is only estimated.

The difficulty is that both in the question of property used and in the cost of distribution the

tendency is to load the Consolidated until both its rate base and its distribution costs are far higher than they should be.

To point out just where the estimates go wrong is not easy. To point out the error in results is not so hard. We will start with the easier problem and then try to analyze the detailed errors.

Rate base enormously high compared with less favorably situated Gas Companies in New York City.

As we have said the Court below has found a "fair value" of $134,000,000. As the Consolidated sells something over 24 million M cubic feet per annum this figure gives a valuation of $5.57 per M cubic feet of annual sales.

Let us compare this with other companies far less favorably situated.

The New York Mutual Company is older than the Consolidated. As its name implies it started out as a mutual company, its charter providing that after it paid 10% dividends all further profits were to be divided equally among consumers and shareholders who were consumers (Act of Incorporation passed April 17, 1886). In 1884 when the Consolidated was formed it was proposed to take the Mutual in and stock was provided for that purpose. It did not come in however (Willcox v. Consolidated, supra, p. 43).

The Consolidated finally obtained 54% of the capital stock of this company (Deft's. Ex. 72, Report to Public Service Commission, 1922). The remainder it apparently never could—certainly never did—obtain, and there was thus a substantial minority interest who would see to it that the utmost was obtained for its property.

The Mutual was not favorably situated for a low valuation of its plant. All its property was in

Manhattan which of course tended to high valuation. The bearing of locating gas properties in New York on Consolidated valuations will be later discussed. Moreover the Mutual had a rather inefficient plant. The 12 gas machines in its plant produce only 24 million feet of gas per day (p. 1112, fol. 1682). Twelve more modern machines at the most recent plants of the Consolidated at Astoria produce 36 million cubic feet per day (Woods, p. 1112 [1682]). This tended to increase both the size of the plant per unit of capacity and its reproduction cost value.

The Mutual Company, moreover, had a very much larger plant than it had need of. Of its capacity of 24,000,000 cubic feet per day it never had need of more than 12,966,000 cubic feet (Joint Facilities Report Exhibit 765, p. 1112, fol. 1651). Its holder capacity of 14,800,000 cubic feet was also far more than its requirements. Its annual sales of 1,992,846 M cubic feet per year were 6.12% of these of the companies in the transfer of gas system (Exh. 765, p. 1112, fol. 1649). The total holder capacity of these companies is 135,180,000 cubic feet. The Mutual holder capacity therefore was 10.9% of the total or 6.5 million cubic feet more than its proportionate requirement.

The density of consumption of this company was also very unfavorable for a comparison of valuation on the basis of annual sales. Through 168 miles of mains, 17% of the Consolidated mileage, it passed in one year only 1,992,846 cubic feet of gas or only 10.3% of the Consolidated sales (p. 1112, fol. 1649). As compared with the Consolidated, therefore, this company had about twice the mains per thousand cubic feet of annual sales.

In 1923 the Consolidated purchased the property of the Mutual Company. There was every reason for the sale to be at arms length. The large

minority interest can be presumed to have insisted upon the largest possible price. The situation of the company with its expensive land in Manhattan, its double manufacturing capacity, its 14,800 M cubic feet holder capacity, its double mileage of mains would lead one to expect a large price per M of annual sales.

As a matter of fact the sales price was $10,010,630 (p. 2177) which amounts to only $3.33 per M cubic feet of gas made and $3.65 per M sold to consumers. The Master and the Court below have, as we have said, found a valuation for the Consolidated which amounts to $5.57 per M cubic feet sold.

Why should this large company, with everything in favor of a low valuation, be valued at nearly twice the fair sales price of a much less advantageously situated company? Obviously property not properly allocated to the Consolidated is considered in the rate base or else parts at least of the rate base are over valued.

We may consider, again, the case of the Brooklyn Union Gas Company whose case is now before this Court. In our brief in that case we show, we think conclusively, that the rate base found by the Court below is much higher than is in any way justified. That company is much less favorably situated than the Consolidated. The Brooklyn Union has a main mileage of 1017 miles, practically the same as the Consolidated but sells only 15 billion cubic feet of gas per year as against the 24 billion sold by the Consolidated.

Yet the Master and the Court below in the Brooklyn Union case have found a fair valuation of only $55,000,000 which comes to only $3.60 per M cubic feet sold.

Here again we have this same large discrepancy.

The sale of the New York Mutual Company to

the Consolidated is a striking evidence that there are various errors in the conclusions of the Court below in this case as to rate base.

A similar sale was considered excellent evidence of present value by the Public Service Commission of the State of New York in its recent decision in the matter of the New York Telephone Company. Appellee's witnesses stressed the bearing of sales price as a measure of value (Allison, pp. 1370, 1377, 1378, Addicks, pp. 1597, 1607, Hoyt, p. 1393).

Moreover, the Mutual sale showed a handsome profit to stockholders. The Consolidated shows in its 1922 Annual Report to the Public Service Commission that it credited to surplus $515,000 as its share of the profit on the sale.

The comparisons above set out indicate conclusively that the Court below is high on its valuation of the Consolidated property by at least $2.00 per M cubic feet of annual sales, or $48,000,000. This is comparing it only with companies far less favorably situated.

We will now try to point out certain portions of the rate base which have been inflated, and how, by failing to take it into account the facts of this particular company, the Court below has reached its inflated figures.

Expensive Real Estate in Manhattan.

Of course, the Consolidated must have some real estate in Manhattan for its offices, repair shops, holders, etc. But that it needs any such large amount of expensive real estate in Manhattan or that, even if technically used it should be included in the rate base at present value figures, seems unjust. Included in this land are certain parcels occupied by more or less antiquated gas plants. This

land, and its value as fixed by the Court below (Finding 71, p. 185), is as follows:

42nd Street Plant	$2,135,000
14th Street Plant	1,547,055
21st Street Plant	2,166,000
11th Street Plant	1,466,875
99th Street Plant	724,000
	$8,038,930

The entire area of this land amounts to but a few acres. Over in Astoria the Company has 340 acres (p. 1173) which cost it $3,760,306 (pp. 1112, fol. 1717) and is now valued by the Court below in this case at $4,350,000 (p. 95).

In Willcox v. Consolidated (212 U. S., 19, 52), this Court said:

> "And we concur with the Court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily presented."

We believe that in the case of this land the valuation is so high that a gross injustice is done when it is continued in the rate base.

Twenty years ago the officials of the company recognized the impropriety of continuing to hold valuable Manhattan real estate for gas manufacturing purposes.

Judge Hough in Consolidated Gas Co. v. Willcox (157 Federal, 849), refused to allow in the rate base any Manhattan land not actually used, saying in part (p. 857):

> "There is one argument to me conclusive of the question raised by defendant's objections to the insertion in capital account of the items termed in the report 'land leased, vacant and unimproved,' a phrase which includes most of the disputed items just referred to. Such argument rests upon a consideration of complainant's general business as explained by the testimony and briefs, of the necessities of its present situation and of recent actual occurrences in respect of the Astoria Plant (hereafter to be more fully treated), which considerations convince me that there is no intention on complainant's part to extend or enlarge its gas business on Manhattan Island in such manner as to require any substantial addition to the lands already actually applied to the necessities of that business. It is clear that for complainant to endeavor so to do would be unwise; it being apparent from any set of values propounded by any part hereto that a great, if not the greatest, obstacle to the cheaper yet profitable production of gas on Manhattan Island, is the enormous value of the land already necessarily devoted to that purpose; and that any more island real estate will be so used the testimony does not compel

me to believe. The folly, and therefore the improbability, of such a course is shown by one undisputed fact, viz., the present value of the real estate now confessedly devoted to gas making on Manhattan Island is over $11,000,000, as found by the Master, yet at the present price of $1 per M, the gross yearly income derived from the maximum production of everything on that $11,000,000 worth of land is less than $10,500,000. That the greatest product of which a plant is mechanically capable is yearly worth less than the value of the land on which it stands is a fact that speaks for itself, and needs no argument to prove that no man of business sense will increase such a business misfortune. Nor is it improper for the Court to take cognizance of contemporary local history, some details of which are in the evidence, and to recognize a determination on the part of the inhabitants of this island to render difficult even the continuance, in so crowded a city, of a business which, in the language of one of complainant's witnesses 'renders us at best unpleasant neighbors.'"

This Manhattan land was included then only because the Company had just bought the Astoria property and had not had time to move over there.

That Astoria was purchased with the idea of moving over there is plain from reference to the record in the case of Willcox v. Consolidated (supra).

Robert A Carter, at that time Secretary of the Consolidated Gas Company, in 1904 swore to a tax report which gave a very low reproduction value for the property of the Company. Mr. Bradley, then Chief Engineer, testified in the Willcox case (Record, p. 1702) that this low figure was arrived at as follows:

"Mr. Carter applied to me for a figure and I took advice with our general counsel on the subject, and was informed as to what the law was in the case. Acting upon that advice, I simply cut the book value in half and added to that—the absolute figures I cannot give you; I have not got them, but I added to that, if my recollection serves me—between $600,000 and $700,000 as the scrap value of the plants to be dismantled, understanding that we were going on with our Astoria business and that within a very short time practically the works would be dismantled and simply scrapped, as we had no market for them. The resulting figure from that—half of the book value and the six or seven hundred thousand dollars that I added—was the figure that Mr. Carter used in the report."

Twenty years ago this Company and the Court recognized the folly of continuing to manufacture gas in Manhattan. Yet twenty years have passed, and gas is still manufactured here in plants which are not up-to-date, as we shall show, and which are still "too much cut up into small units," as Mr. Bradley testified twenty years ago.

Should the consumers be always burdened with this high-priced land? What a tremendous burden it is, may be readily seen.

The Brooklyn Union Company sells 15 billion cubic feet of gas per year. Its land is valued by the Court below at $3,000,000, or 20 cents per M cubic feet sold per annum. The Consolidated land value is 60 cents per M cubic feet sold or three times as much.

Comparison is made with the Brooklyn Union Company because that company is most nearly comparable with the Consolidated. It serves the

most populous parts of the most populous borough in the Greater City of New York. Its land is valuable land in that borough.

It is true that both the company's experts and Mr. Little, the Attorney General's expert were opposed to immediate scrapping of the New York plants (Woods, pp. 1956-1958; Little, pp. 1879-1894). The reasoning of both is faulty, we believe. It appears to be based mainly on the erroneous supposition that the plants should not be moved until their value could be amortized out of future rates. It is a strange topsy turvy method of accounting to attempt to charge future consumers with losses that are the inevitable result of actions in the distant past. The company knew twenty years ago that their plants were doomed to destruction. They should have and as a matter of fact have amortized them already. Moreover, why should future consumers be called upon to amortize the loss on these plants when they will not be allowed to enjoy any of the attendant profit on the real estate, that being credited to surplus as was done in 1923 when these plants were sold.

But the point is not whether they should suddenly now be abandoned. The point is that they should have been moved to Astoria fifteen years ago.

The injustice of keeping them in the rate base is emphasized by the real purpose of keeping them—namely as profitable land speculations at the expense of the consumers.

As an instance—and a conclusive one—of the real reason for keeping these Manhattan plants let us take the two plants recently sold, the 14th Street plant and the 42nd Street plant.

These two plants—old style coal gas plants—with a daily capacity of only 9,500,000 cubic feet between them (p. 1112) stood on land valued at

$3,682,055 in this case (p. 185). The plants themselves are valued by the Master at about $3,000,000 (a). In 1906 Mr. Bradley testified that they were "out of date and somewhat antiquated" (Willcox v. Consolidated, Record, p. 1732). If they were antiquated twenty years ago what shall we term them now? Gas was almost never made in them. When it was its cost was astounding. For instance in 1916 gas cost $34.211 per M to make at the 14th Street plant and $5.756 at the 42nd Street plant and in 1920 it cost $2.14 per M at the 14th Street plant and $2.098 at the 42nd Street plant (pp. 1858 1859).

Judge Hough remarked in Consolidated v. N. Y. (supra), that the value of the output from the Manhattan plants as a whole did not equal in one year the value of the land on which the plants were built. In the case of the 14th and 42nd Streets plants the value of the product in the ten years from 1913 to 1922 equalled only a small percentage of the value of the land devoted to these plants. In no one year did the value of the product of these plants equal even the taxes on that land.

In 1920 these two plants were run for their final spurt due to extreme weather and the incompletion of the new unit D at Astoria. After this was completed a large part of the property at the two plants was marked withdrawn from service and so reported in the annual reports to the Public Service Commission (Woods, p. 1246). He says, naively, "we thought we were about through with rate cases for a while" (p. 1248). The former case was decided by this Court March 22, 1922, and the property withdrawn a few months later.

(a) No separate valuation for these plants was made by the Master. The figure of $3,000,000 is an approximation based on a comparison of the Master's figure for present value of all property with the evidence and the Master's finding for reproduction value of all property.

The plants were abandoned but stood there and the Master has solemnly declared that they were used and useful in the gas business (p. 93).

Yet why were these plants really kept? Plainly they were kept until a handsome profit could be made on the land. When such a profit was in sight they were quickly sold.

The consumers paid taxes on this valuable land for 50 years and more. They paid more than a fair return on its increasing value year by year. Yet what happens when it is time to realize this increased value?

The answer is found in the company's report to the Public Service Commission for 1923 in the notation, "Additions to surplus (and of course available for dividends) $1,830,412." In other words the profits from this real estate transaction were immediately transferred to surplus.

When the enterprising New York real estate operator decides it is time to build nice apartments at 99th Street, 21st Street and 11th Street those too will be sold and the company will reap the profit.

Have we not here a case which brings up the very question postulated by this Court in Willcox v. Consolidated (supra)? We have land which has increased immeasureably in value. We find it held not for purely gas purposes but for speculative purposes. The consumers have paid a return on its excess value, have paid taxes on it and have paid the additional cost of making gas at inefficient plants built on it. When the time comes the enormous profits are put in the pockets of the stockholders. Is it not time that the courts ceased to base rates on these inflated values?

Improper Allocations Increase the Rate Base.

An outstanding factor in ascertaining both rate base and operating expense in the case of appellee is the interlocking character of the gas plants and mains of the Consolidated and its subsidiary companies in Manhattan, Queens and the Bronx. A description of this interlocking system is given by the Master in his report (pp. 76-82). The gas manufactured at the four Consolidated plants, the Astoria plant, the New Amsterdam plant, the Central Union plant and the Standard plant all goes into a common reservoir, the transfer mains of the system. As the Master says:

> "As an inevitable result of the foregoing, it has become impracticable, as an engineering matter, to identify the gas in most of the holders and gas mains as having been manufactured at any particular plant or by any particular company" (p. 79).

Consequently no one knows what plants, holders, mains, tunnel, etc., were actually used to furnish the consumers of the appellee with gas. How much gas is made in the system is known, how much gas is consumed is known. Beyond that nothing is known or can be known.

In the 1906 case the Court below held that appellee could include in its rate base only its own property and should be allowed in its operating expenses only what it paid other companies for gas presumably bought from them (Consolidated Gas Co. v. N. Y., supra, p. 860).

This is a consistent theory but it has not been followed in the District Court either in the 1920 case or in the instant case. In both the principle has been partially applied that the Consolidated should have the benefit in its rate base of such parts

of the various plants as are actually used to furnish gas to its consumers. This theory, advanced in the 1906 case has now taken hold, but only partially, and most unfairly to Consolidated consumers.

It is obvious that if such an allocation is to be made the only fair way to do it is to take all the joint facilities which really include plants as well as holders, transmission mains, tunnels, etc., and divide them among the various companies on the basis of annual sales. If legal obstacles are to be hurdled they should be hurdled and all property put in one pot.

This, however, is not done. What is done is well calculated to increase the rate base of appellee. Appellee is first given in its rate base the value of all the very valuable property in Manhattan standing in its name including the expensive 14th Street and 42nd Street plants. After that it is given a portion of the less expensive property on Long Island and in the Bronx. It goes without saying that if all the property were pooled and the Consolidated given in its rate base only its share of the total the result would be far less than is obtained by the present method. How much less cannot be ascertained from this record. In that respect appellant claims there is a failure of proof. The Court, having decided to disregard legal fictions and corporate entities should have taken proof as to the value of all system property and allocated to appellee only its share of the whole.

That the failure to do so has resulted in a largely increased rate base and that the method of allocation adopted was adopted with that end in view is conclusively indicated by one example in the calculations of appellee adopted by the Court below.

The Master in his report describes the method of allocation of the plants which have excess capa-

city (p. 80). This description is based upon what is called the "Joint Facilities Report" (p. 1112, fols. 1648-1653) made by Chief Engineer Woods each year. This report assigns to each company its own plants. There are then remaining the Astoria and New Amsterdam plants which have additional capacity above their own needs. This excess capacity is then arbitrarily allocated to the companies which have need of additional capacity.

These two companies bear the same relation to the Consolidated, namely it owns practically the entire capital stock of each.

Their physical situation is very similar. Both plants are on the westerly shore of Long Island. Each has a tunnel to transmit its gas to Manhattan and the Bronx respectively, and the two plants are connected by a large main. The New Amsterdam tunnel comes out at 71st Street, in the heart of Consolidated territory. The Astoria tunnel comes out in the Bronx at 132nd Street (Ex. 832, p. 2387). Naturally Consolidated consumers use New Amsterdam gas and it is so admitted in the Woods report which assigns to the Consolidated 56.44% of the New Amsterdam tunnel. If it uses 56.44% of the tunnel which transmits the gas it must use 56.44% of the plant which manufactures the gas. This seem inevitable logic.

It would be naturally supposed that in assigning plants the same 56.44% of the New Amsterdam plant would be assigned to the Consolidated. But no. Instead of assigning the percentage of the manufacturing capacity of each plant to the Consolidated the New Amsterdam excess is assigned to the Bronx companies and the Consolidated is loaded up with 80% of the Astoria output.

The reason for this strange allocation is easily found and sheds a flood of light on the modus operandi of "allocation" for the sake of rate base only.

The Astoria plant contains the only coal gas units in the system. Coal gas plant capacity costs approximately twice as much per unit of capacity as water gas capacity (p. 1183). Also the Astoria plant was built more recently and at higher prices (p. 1112, fol. 1716). The result is that the cost of the Astoria plant, as it appears in the Woods report is $25,769,744 or $300 per unit of capacity. The New Amsterdam cost is given as only $5,738,872 (p. 1112, fol. 1719) or only $159 per unit of capacity.

Eighty percent of the Astoria capacity amounts to $20,616,000, assigned to the Consolidated. If 56.44 per cent. of the two plants were assigned to the Consolidated the amount would be only $17,771,000. By taking the less logical method of allocation the Consolidated rate base has been increased by $2,845,000. If the computation is based on the present value of plant as found by the Court, the difference becomes $4,000,000.

This is one instance of the methods used to increase Consolidated valuation at the expense of the other companies.

Reserves in Relation to Consolidated Needs.

Besides the property actually and necessarily used in producing gas there are plants and portions of plants held for reserve and very large amounts of land and other property which are expected to be required to meet the needs of the system as a whole. As in the case of identity of the gas used by any particular consumers so in the case of the reserves it is impossible to say how much reserve should be kept for the consumers of any particular company. The assumption is made that a reserve of 20% should exist for the system as a whole and that enough land should be available to provide for the systems growth for many years in the

future (Finding 55, p. 176). Less than one-third of the land at Astoria is now in use and there is besides a very large area at Hunt's Point for future use on which a modern coke oven plant is now being erected.

The difficulty, however, is in ascertaining what portion of the reserve should be allocated to the appellee. The system used is to allocate to each company that proportion of the reserve which its yearly consumption bears to the total consumption (Woods, p. 1112, fol. 1684). This would be fair if all companies were growing in the same proportion and if all would have a proportionate need of the additional facilities in the future. This is far from being the case, however. The population of Manhattan Island, where the Consolidated operates, is actually decreasing while the population of the Bronx and Queens is increasing by leaps and bounds. Gas consumption, similarly will decrease in Consolidated territory and has actually done so since the close of the testimony in this case, while in the territory of the other affiliated companies it did increase and will increase enormously in the future.

Thus the calculations by Chief Engineer Woods as to future needs of the system and of the Consolidated (Pltff's Exs. 833 and 834, pp. 2388 and 2391) which are made to sustain charging the appellee with a large share of the surplus property all are faulty in this respect. And the Court below has fallen into the same error. Although the system as a whole will undoubtedly need the large additional acreage at Astoria and the unused land at Hunt's Point, yet there is no proof and can be no proof that appellee will in the future need its present percentage or indeed any large percentage of the reserve properties. Indeed the probabilities are that the Con-

solidated itself can get along very well with its present capacity plus the amount they now draw from other companies.

Jointly Used Facilities. The Astoria tunnel is built for far more than its present capacity. It is 20 feet square (p. 1282) and contains only two 72 inch mains (p. 2880, fol. 4258). It could hold four. Undoubtedly when the Bronx has grown to the size of Brooklyn this tunnel will be used to its capacity. But the additional half of its capacity will not benefit Consolidated consumers but consumers of affiliated companies in the Bronx. The value of the Astoria tunnel and the tunnels owned by the East River Gas Co. is fixed by the Court below at $6,146,427 (p. 202).

The same may be said of the 48 inch mains in the Bronx which run across the Bronx from the end of the Astoria tunnel to the Kingsbridge holder. The Consolidated has no consumers served by this main and it has another means of access to the Kingsbridge holder. Yet Mr. Woods in his report states (p. 1112, fol. 1705) that the Bronx companies who use these 48 inch mains really need only a 30 inch main and charges the balance to the Consolidated (pp. 1230, 1231). A 30 inch main has a capacity of only a little over one-third of a 48 inch main. The testimony of the experts of appellee give an estimated reproduction cost of this 48 inch main as $2,168,151.00 (p. 2690). Of this sum only $669,525.00 is charged to the Central Union and Northern Union Companies (p. 2691). That the Consolidated which has no consumers in this territory needs two-thirds of this main is not a reasonable supposition. Yet that is what is charged to it and the Court has followed this (p. 187).

What has really happened here, as elsewhere, is that the enormous growth and prospective growth of the Bronx and Westchester warrants a large

main through this territory. The large main is built but while the Bronx is growing up to it the excess cost and value is placed on the Consolidated.

These are but some of the methods by which the appellee has loaded its own rate base and they indicate the errors into which the Court below has fallen. To point out in exact detail the Court's errors is impossible. The exact property used by the various companies, the exact proportions in which it is used by the respective companies is impossible of ascertainment. What is attempted to be done is merely to point out how the appellee has contrived, in spite of its favorable situation, so to load its apparent rate base that it can get a finding that its property is worth nearly twice as much per unit of capacity as that of far less favored companies.

POINT I.

The rate base should not exceed $84,000,000 and in such a case as this should probably be fixed at a much lower figure.

We have indicated above the various methods used by appellee to increase its rate base out of all proportion to that of other companies less favorably situated. We earnestly contend that appellee has failed to prove how much of the property of the various affiliated companies is actually used by appellee and that the case should be sent back to have more extensive proofs taken.

To say what the rate base should be is not easy. It certainly does not seem that it should exceed $3.50 per M cubic feet of annual sales or $84,000,000. Approximately this figure we will show in the Brooklyn Union case is too high. A figure of about

this was considered fair in the purchase of the Mutual Company in 1922.

This is checked again by the results of appellee's operations in 1921. In that year it will be recalled appellee had a favorable rate of $1.20 per M fixed by the Court for the first two months and thereafter was free to fix its own rates. From March 1 to August 1 it charged $1.50 per M and after August 1 it was apparently so pleased with results theretofore during the year that it reduced its rate to $1.25 per M for the balance of the year. It had available for return 22.7¢ per M cubic feet sold during the year. This is 7.5% on a valuation of $3.00 per M and 6.5% on a valuation of $3.50 per M. As the company claims it will be satisfied with no less than 8% on the value of its property and as it certainly was satisfied with this return which it fixed itself it is fair to say that it was satisfied with 8% on a value of less than $3.00 per M.

As has been pointed out above it is the earnest contention of appellant that there is no basis in the record for any findings as to the property used and useful by appellee in its gas business and that the attempts to allocate various properties have been with the purpose and result of loading the appellee with properties which it does not actually use.

This contention is insisted upon and the discussion of the values of properties as allocated is not to be deemed a waiver of it.

The Master in his report finds that there should be included in the rate base of appellee as of June 1, 1923, all of the plants and properties in Manhattan including the 14th and 42nd Street plants (p. 174), 80.07% of the Astoria plant (p. 156), 56.45% of the Astoria and New Amsterdam tunnels and the bulk of the other jointly used facilities including the 48 inch mains in the Bronx (p. 1112, fols. 1685 and 1698).

We have pointed out briefly above the error in considering the antiquated 14th and 42nd Streets plants as part of the rate base as well as the error in including so much of the Astoria plant and tunnel and of the Bronx mains.

The figure of $84,000,000 for rate base in reality takes into consideration all the factors mentioned in Smyth v. Ames (supra).

In the recent case of Georgia Ry. & Power Co. v. Railroad Commission Georgia Railway and Power Co., 262 U. S., 625, 629, this Court said:

> "The case is unlike *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission, ante,* 276. Here the Commission gave careful consideration to the cost of reproduction; but it refused to adopt reproduction cost as the measure of value. * * *"
>
> "That part of the rule which declares the utility entitled to the benefit of increases in the value of property was specifically applied in the allowance of $125,000 by the Commission to represent the appreciation in the value of the land owned.
>
> "The lower Court recognized that it must exercise an independent judgment in passing upon the evidence; and it gave careful consideration to replacement cost. But it likewise held that there was no rule which required that in valuing the physical property there must be 'slavish adherence to cost of reproduction, less depreciation.' It discussed the fact that since 1914 large sums had been expended annually on the plant; that part of this additional construction had been done at prices higher than those which prevailed at the time of the rate hearing; and it concluded that 'averaging results, and remembering that

> values are * * * matters of opinion, * * * no constitutional wrong clearly appears.'
>
> "The refusal of the Commission and of the lower court to hold that, for rate-making purposes, the physical properties of a utility must be valued at the replacement cost less depreciation was clearly correct."

There the Court below had fixed a valuation which approximated actual investment and was only about 50% of the company's claim as to the cost of reproduction new.

The analysis of the opinion of the Court below in that case can well be a guide in coming to a decision as to the proper rate base here. The first element considered in the Georgia case is "the original cost of construction" which is the first of the elements mentioned for consideration in Smyth v. Ames, 169 U. S., 466.

The Court below in the instant case has found what it calls "cost" to be $98,891,804 (p. 199). This is, however, not "original cost of construction." What the Court calls "original cost" is in reality book value of the various items included. the basic or original entries from which these book values were built up was the inflated Rowland appraisal of the properties of the constituent companies when the appellee was formed in 1884. The total investment is shown as $37,881,764 (p. 2807) which included the sum of $7,781,000 for franchises leaving $30,100,764 for tangible property. The $37,881,764 figure was used for the capitalization of the original company. As a matter of fact the Gilbert committee which investigated the consolidation came to the conclusion that the actual "original cost" did not exceed $21,000,000 (Record, Newton v. Consolidated, pp. 17720 and 17897). There is therefore a difference in the

original entry of approximately $9,000,000 between actual "original cost" and book value of the tangible property.

With these facts before us it is not difficult to arrive at a figure from the Master's findings as to actual original cost.

The Master's figure for "cost" of the tangible property and structural overheads of appellee as or June 1, 1923, is found in Finding 92 (p. 196) as $51,377,363

From this, however, must be deducted the original cost of the land and plants at 14th and 42nd Streets (Plff. Exs. 820 and 821)or..... 4,805,237

There must also be deducted the amount of inflation in the 1884 figure or 9,000 000

The total deductions being $13,805,237

The net true "original cost" of the property actually owned by appellee is $37,572,126

Of course certain property of the other companies is used by appellee. How much, whether of its own or of others is actually so used is impossible of ascertainment. If we start again with the conclusions of the Master we find that he gives the appellee 80% of the property of the Astoria company (p. 174).

To the actual "original cost of construction" of the Consolidated property of $37,572,126

We will add for a starting point the Master's percentage of allocation of Astoria property less working capital or (p. 196)... $20,931,245

As has been indicated above however, the arbitrary allocation of 80% of the Astoria plant to the Consolidated while the much cheaper New Amsterdam excess capacity is allocated elsewhere is entirely unjustified. If the two plants were allocated on the same basis as the tunnels which transmit their output the saving to the Consolidated would be, and there should be a deduction of	$2,845,000	
This gives the cost of manufacturing property of other companies allocated to the Consolidated as.....		18,086,245
The cost of construction of the Consolidated property plus the property on Long Island is, then		55,658,371
To this again must be added a portion of the two East River tunnels and of the other property of the Standard Gas Light Company of the East River Gas Company. These are given by the Master (Finding 91, p. 197) as		3,982,194
This gives a total of.....		59,640,565
There must be added to this, of course, an amount for working capital. This, as we shall show later, should not exceed the sum of		4,000,000
Which gives a total for tangible property including organization expenses and working capital of.....		63,640,565

Original cost is then only $63,640,565 or $20,000,000 below the figure of $84,000,000 which all comparisons show is a liberal figure for this company.

How much should be added in recognition of increased present value?

In the Georgia Railway and Power Co. case (supra), this Court held that the Court below was not in error when it added only $125,000 or 2% of original cost in recognition of increased costs. If that percentage were added here we would have a valuation of only $64,913,376.

This Court has distinctly held, however, that the sum of $7,781,000 included in the original capitalization of appellee for "franchises" must be included in fixing rates for this corporation. It also has inferentially held that the increased valuation indicated by the Rowland appraisal should also be included. This amounts to $9,000,000. If these two sums totalling, $16,781,000 are added to the total above of $63,640,565 calculated as actual original cost we give appellee an appreciation of 25 per cent. over cost instead of the two per cent. approved in the Georgia Railway & Power Co. case (supra). This gives us a figure of $80,421,565 without any recognition of the increase value of land. In view of the peculiar situation here is certainly seems that some departure from the general rule in regard to land values is not only warranted but demanded. It would not be unfair under the circumstances to allow no increase for this. Certainly $3,500,000 would be liberal. This gives a rate base of $83,921,565.

In this case, where an unprecedented allowance of $7,781,000 is made for "franchises" there should be no addition because of "going value" or for other "intangibles". This question will be discussed more at length in another portion of the brief.

Looking at the question then, from every fair viewpoint it would seem that $84,000,000 is an ample figure for rate base, before deducting depreciation.

POINT II.

The operating expenses of the appellee should not be allowed at a sum greater than 75.73 cents per M cubic feet sold after deducting miscellaneous operating revenue.

Of the three cases which have been before the Federal Courts brought by this appellee, this is distinctive in several particulars:

FIRST.—In this case for the first time a Master heard the case who had already heard one case under this law and several under the 80 cent statute and whose attitude of mind pointed with exactitude to his final determination.

SECOND.—In this case for the first time the same judge who appointed the Master approved his report, taking jurisdiction over the final hearing over the protest of appellant after the case came up in its due order before another judge.

THIRD.—The District Court Judge affirmed the Master's report in an opinion which is cursory in the extreme compared to the exhaustive and carefully prepared opinions of Judges Hough and Hand in the former Consolidated cases and Judge Campbell in the recent Brooklyn Union Gas case (see Opinion, pp. 316-321). Of the five pages occupied by the opinion of Judge Winslow one-half and more is taken up with a statement of the case. The opinion itself is, in effect, a short veto message.

The affairs of the appellee have not changed materially since 1920 when Judge Hand rendered his very able opinion in Consolidated Gas Company v. Newton (supra).

After the routine disposal of the present statute by the Judge who heard the instant case it is refreshing to examine the conclusions reached by Judge Hand after painstaking and diligent study on the same subject matter.

In no part of the case is his reasoning more clear and his conclusions more nearly sound than in his treatment of the operating expenses of this great holding and manufacturing corporation. We say "more nearly sound" for we feel that not even he, with the best will in the world, could actually find out what were the costs reasonably chargeable to this company.

The Master in this case is at great pains to show why he should not follow Judge Hand's rulings (pp. 140-146). He evidently considers that the learned Judge was unfair to the company, and while it may be proper to "take all doubts" against the company when the rate cannot be saved in any event, that method is not to be followed if by chance it might result in declaring the statute valid. This reasoning seems quite inadmissible and is another evidence of the bias of the Master below.

The difficulties in the way of ascertaining the reasonable production and distribution costs as applied to appellee are foreshadowed in the discussion above in relation to rate base. The consumers of the Consolidated fail to receive the benefits to which they should be entitled in view of the enormous output of the Company.

In production costs, prices are raised by the maintenance of many small plants where cost of production and maintenance is high compared with the larger, more up-to-date and more economical plants of the Astoria and New Amsterdam companies on Long Island. So that the consumers of appellee, because for speculative purposes it chooses to keep valuable land for gas manufacturing in

Manhattan, must pay high and increasing taxes and returns on this property.

The Company will, before many years, receive many millions of dollars in speculative profits on this land. It does not seem unfair that in the meantime the incidental disadvantages of holding it, both in increased rate base and in increased operating expenses, should be borne by the stockholders rather than by the consumers?

The extent to which this continuance of comparatively inefficient plants burdens the consumers is readily seen from a comparison of manufacturing costs plus real estate taxes at the Manhattan plants of the Consolidated as compared with the same figures for the Astoria and New Amsterdam plants. These figures for the year 1923 are as follows:

FIGURES FOR YEAR 1923

Consolidated Plants		Astoria		New Amsterdam	
Production Costs(a)	Taxes(b)	Production Costs(c)	Taxes(b)	Production Costs(c)	Taxes(d)
$49.75	6.00	44.99	3.70	46.76	3.10
Total	55.75	Total	48.69	Total	49.86

This difference of over 7 cents per M between Consolidated cost and Astoria cost is a partial indication of the cost to the consumers of operating on Manhattan Island. If taxes on the holder stations were added in the case of the Consolidated, as in the case of the Long Island companies, the difference would be still greater by nearly two cents. And with a return at even 6% on the original cost of this property, the consumer cost of land speculation in Manhattan becomes prohibitive.

(a) See Exhibits 816 and 817, pages 2330 and 2334 (does not include taxes on holders).

(b) See Exhibit 817, page 2334 (includes taxes on holders).

(c) See Exhibit 818, page 2343.

(d) Taxes estimated from tax rate and valuation found in Exhibit 766, page 1112, fol. 1719 (includes taxes on holders).

One particular in which the instant case is markedly different from the case before Judge Hand is that while in the former case prices were going up throughout the period under consideration, here there is a marked decrease in price as shown by the following table:

COST IN CENTS PER M MADE

	Astoria Costs (Pages 2838 & 3032)				Consolidated (Master's Findings 64 & 65)
	Water Gas		Coal Gas		
	Plant C	Plant D	Plant A	Plant B	
1922	47.00	43.98	54.31	63.17	54.79
1923	42.56	41.97	46.97	54.70	50.29
1924	43.04(a)	41.73(a)	38.54(a)	42.70(a)	48.45

The marked difference of from 8 to 11 cents in water gas costs between the Astoria plants and the Manhattan plants, without taking into account the 3-cent difference in taxes, speaks for itself. Gas manufacturing on Manhattan Island is an expensive luxury for consumers, though it be a profitable speculation for the company. The Master in his report tries to argue away this difference, but his argument shows an entire absence of detail, and in fact fails to meet the issue (pp. 128-132).

In the prior case both the Special Master and the District Court saw the force of this argument and both based their estimate of production cost on Astoria. The Master took the Astoria plant as a whole, while Judge Hand took Plant A for coal gas and Plant C for water gas, as those were the best. He said:

> "The Master accepted for a standard the cost to manufacture, taken from the books of the Astoria Co. for the first eight months of 1919. This is a plant over ten years old, but

(a) Estimate by witness Little as revised by witness Woods.

it may, I think, be safely taken as a proper standard. Certainly Mr. Little thought that for coal gas House A. and for water gas House C. were suitable. He thought House B. not economical because of the absence of certain labor-saving devices, though the item for labor was greater for House A. in his estimates, but of House A. he made no complaint.

I shall therefore take the analysis of the costs at House A. for coal-gas and House C. for water-gas, as taken from the Astoria books for the full year 1918, and for the first eight months of 1919" (Record, p. 159, on appeal to U. S. Supreme Court).

Consolidated Gas Co. v. Newton, supra, pp. 231, 250.

Since that case was decided Plant D. has been added at Astoria and is even better than Plant C.

However, in order not to cut too closely we will take as a basis the Astoria costs as a whole with out discriminating between plants. These were, according to Woods correction of Little's estimate, for 1924 as follows (p. 2838):

Water gas	42.35
Coal gas	40.75

We will not ask the Court to go into the question as to whether Little's estimate or Woods correction thereof is more accurate. We believe Little to be sound but will waive the point and not ask for the further reduction of one cent which Little's estimate calls for.

The output of the Consolidated system is approximately 20% coal gas and 80% water gas (Ex. 891, p. 2800). Applying these percentages to the 1924 figure gives an average cost per M made of 42.03 cents for 1924.

The 1923 figure is higher by 2.96 cents per M (Ex. 818, p. 2343), but this statute was not to go into effect until June 1, 1923, so that in view of falling prices the 1924 figures are better adapted for a criterion.

To this cost per M made of.....	$.4203
Must be added for gas storage (Finding 52)	.0109
Giving a total holder cost per M made of..	$.4312

A certain amount of gas, 4.31% of the total (Finding 54, p. 176) is lost by condensation, leakage and so forth. To find the cost per M sold it is therefore necessary to increase the price accordingly which gives a holder cost per M sold of $.4507. This compares with the Master's cost, found by including the expensive Manhattan plants, of $.4845 per M (Finding 110, p. 206). If the Court should follow Judge Hand's calculations and use the production figures for Plant A. for coal gas and Plant D. for water gas the result would be a production cost of only 42.29 cents per M sold.

If the figure of 45.07 cents per M for operating costs is taken it seems that the Court would be liberal with the appellee. This is particularly the case if the excessive taxes on the land devoted to the Manhattan plants, except the 14th and 42nd Streets, are allowed in taxes of appellee.

Distribution Expenses.

It is in the distribution expenses that the wide ramifications of the interests of appellee come in to obscure the issue. As in trying to arrive at a rate base we are utterly at a loss to determine which properties are actually used by appellee so in dis-

tribution expenses we are at a loss to determine just what expenses are properly chargeable to appellee.

From its imposing office building in 15th Street its president and directors, its treasurer and accounting employees, its heads of department and its agents direct and control not only the gas supply of the Consolidated's 600,000 consumers, but, raise the money, direct the policies, superintend and manage no less than fifteen substantial corporations which between them furnish all the gas and electricity in New York County, Bronx County and most of Westchester County, as well as most of the electricity and a large part of the gas in Queens County. Of these counties New York has 2 million inhabitants, the Bronx one million and Westchester and Queens one-half million each.

To separate from the enormous expenses of this far spread monopoly those which in reality belong to gas making and distributing in a portion of one county is a task which defies human calculation. Some efforts at allocation are made but the results but point the moral that it is to the interest of this most favorably situated gas company to burden itself at the expense of its subsidiaries so that its rates may be kept at a high figure.

As the Court, in view of the bewilderment involved in ascertaining the property actually used is, we contend, thrown back necessarily on finding a value by comparison with other less favored companies, so in the question of distribution expenses we can well rely on the evidence of what these charges are in independent companies both as an indication of what they should be here as well as an indication of the fact that such allocations as are made tend to burden appellee.

It goes without saying that though production costs may remain stationary after a certain volume

has been attained, distribution costs must vary inversely with the quantity of production per unit of distribution equipment. In the latter particular the Consolidated, probably above all others, is peculiarly favored. Its consumption per mile of main is enormous. It can run one large service into an apartment house for several hundred meters where most companies have a service for each consumer. It can spread its superintendence, main repairs and overhead over a so much larger number of units that its cost per unit is or should be the lowest. Indeed its advantages in distribution were no doubt the chief factor in making it the lowest price gas company in the days before it began fixing its own rates.

Yet today its distribution costs do not bear comparison with those even of the comparatively miniature Kings County Lighting Company whose case is now before this Court.

The Master has allowed the appellee $.2761 per M sold for distribution expenses (Finding 110, p. 206). The Kings County Lighting Company which sells but 2 billion cubic feet of gas in a sparsely settled territory in Brooklyn, as against the Consolidated's 24 billion cubic feet, distributes its gas for only $.2689 per M (Record, Ottinger v. Kings County Lighting Company, p.). Again the appellee put in evidence the cost of distribution of all the affiliated gas companies, eliminating intercompany charges. The Master has made findings as to this. The comparison between the Consolidated cost and the system cost is enlightening. For 1922 the Consolidated cost was 30.39 cents and the system cost 29.47 (p. 183). For 1923 the Consolidated cost was 27.61 cents and the system cost 27.77 cents (p. 183).

There is obviously no reflection in these figures of the more favorable situation of the Consolidated

with its enormous consumption per unit of capacity. It has a consumption per mile of main of 24,333 cubic feet. The system consumption per mile of main is only 17,484 cubic feet.

Obviously the methods of allocation are for a purpose and that purpose is to burden Consolidated consumers.

Judge Hand in the prior case with great diligence cut here and cut there in an endeavor to pare away the excess charges on the parent company (Consolidated Gas Co. v. Newton, supra, pp. 253-257).

The same methods applied in this case would result in a saving of about 1½ cents per M cubic feet sold.

In the former case, Judge Hand said as to these expenses (Consolidated v. Newton, supra, pp. 253-257):

> "These expenses are made up from the books of the company, which I have already held to be good *prima facia* proof. Various items are challenged which must be taken up seriatum:
>
> "(e) Salaries and (f) Supplies at General Office. The salaries of the general officers should be apportioned as the Master recognized and the defendants claim, but it is very hard to find any satisfactory theory on which to allocate them. Obviously it is impossible to learn what part of his time each officer gave to gas or 'non-gas' business. The method suggested of dividing in accordance with the income has few advantages except that it is an intelligible theory and has at least some relation to the facts. I shall adopt it, but only because I am taking all doubts against the plaintiff. The same applies to the Transfer, Accounting and Cashier's Departments. In the Engineering, Commercial, Purchasing and

Chemical departments there can be no ground for any allocation at all. All this work presumably went for gas manufacture, and so much of it as was expended for other companies appears to have been charged against them in the books. Mr. Woods did not apparently keep exact track of his time but the portion of his salary to be allocated is very trifling. I shall accept those items.

"The rest of the charges it is hopeless to attempt exactly to apportion. I shall assume that it was shared between all the foregoing departments in the proportion of their salary accounts, and I shall deduct one-third of that part attributable to the General Offices, Transfer Accounting and Cashier's departments. The result of this as I make it, is Seventy-seven thousand one hundred and twenty-two dollars for 1918 and Fifty-three thousand eight hundred and thirty-seven dollars for 1919.

"(f) General Office Supplies and Expenses. I apportion these, very roughly it is true, by deducting that percentage of the whole which the deduction from the preceding item bears to the whole item; that is, I deduct Twenty-three thousand five hundred and nine dollars for 1918 and fifteen thousand three hundred and sixty-one dollars for 1919.

* * * * * * *

"(h) Legal Expenses. I think these should follow general officers' salaries. I deduct fourteen thousand one hundred and eighty-three dollars for 1918 and thirteen thousand three hundred dollars for 1919.

"(i) Insurance. The insurance item covers not only some property not used in the gas business, but the Fourteenth Street and Forty-

second Street plants, which was will appear, I am eliminating from the 'rate-base.' These items should come out and the means of adjusting the item on the basis has not been pointed out. The defendants claim a deduction based upon the income which has been earned by the insurance funds and upon the insurance participation certificates. These certificates are issued to the plaintiff merely as evidence of the surplus in any year of the premiums over losses. It does not appear that subsequent premiums may be paid by their redelivery, but possibly this is true.

In view of the fact that the insurance premiums include property not used for gas purposes, I think I should accept the defendants' demand on this item, Seventeen thousand one hundred and forty-eight dollars for 1918 Seventeen thousand four hundred and eighty-one dollars for 1919.

* * * * * * *

"(m) Interest on Consumers' Deposits. In whatever way figured, it seems clear that this is in no sense a proper item in the cost of distributing gas to the consumer. I am not trying to learn what were the revenues of the company in the past, but to establish a basis for the cost of distribution in the period to be covered by a decree. I disallow this item, Forty thousand nine hundred and five dollars for 1918, Thirty-three thousand six hundred and one dollars for 1919."

It is certainly fair to apply Judge Hand's deductions to the cost of distribution as set up by the plaintiff. The total distribution cost for the

year 1923 appears on Exhibit 816, tabulation of Mr. Teele (p. 2333), as follows:

Distribution superintendence and supplies and expenses	$ 609,138.81
Gas Meter and installation work	498,615.90
Work on consumers premises, miscellaneous	626,528.92
Work on consumers premises, Gas Supply Inspection	100,101.06
Repairs of gas mains	187,263.59
Repairs of gas services	159,168.27
Repairs of gas meters	541,028.56
Repairs of distribution tools	42,709.84
Repairs of gas appliances	252,046.59
Repairs of buildings	30,139.75
Repairs of street lamps	1,317.18
Commercial expenses	1,671,811.72
Salaries—general office	508,642.11
Supplies and expenses—general office	301,154.11
General law expenses	49,679.10
Claims and arrears expenses	27,632.06
Claims for damages	6,264.57
Insurance	158,546.42
Vacations and sickness	143,974.04
Contributions to Employees Mutual Aid Society	85,165.82
Superannuation	158,968.18
Stable and automobile expense	288,613.11
Miscellaneous general expense	176,061.06
Undistributed adjustments	134,658.60R
Duplicate gas charges	84,122.70R
Uncollectible bills	110,734.41
Interest on consumers deposits	94,032.42
Use of distributing system	474,535.49
Expense re Gas Rate Appeal No. 3	86,458.06

Expense re P. S. C. Hearings....	113.56
Repairs, insurance, etc., re property rented to others.....	547.77
Total distribution and other expenses	$7,172,211.18

The amounts to be deducted under Judge Hand's opinion are as follows:

Account—Salaries—general office:	
Salaries of general officers and cost of Maintaining Accounting Dept., Transfer Dept., and Cashier's Dept.	$ 89,789.36
Account—Supplies and expenses—general office:	
Same proportion of balance in account, after deducting preferred stock dept., as the deduction in account "salaries—general office" bears to total of that account...	37,146.15
Account—general law expenses—one-third	16,559.70
Account — Miscellaneous general expenses:	
Account—Gas supply inspection....	100,101.06
Account—Expenses re Gas Rate Appeal No. 3.....	86,458.06
Expense re P. S. C. hearings.....	113.56
Account—Insurance—Insurance on 14th and 42nd Sts. Plans.....	4,300.00
Account—Use of Distributing System:	
Representing return on investment	318,575.55
Less revenue applicable to same ($2,257.84)	316,317.71
Account—Interest on consumers' deposits	94,032.42
Account—Interest on unpaid taxes..	115,042.57
	$859,860.59

Besides the amounts in the above tabulation which follow accurately the deductions made by Judge Hand there are several items of expenditure which the appellant contends should also be deducted. These are as follows:

(1) Preferred stock department, $90,096.43. This amount was spent for the year 1923, in order to set up a new department to distribute preferred stock. It was an abnormal expense, a large part of which and probably all of it will be taken care of in the future by the regular transfer department, and will not appear as a separate item. In the tabulation above this amount has been eliminated from the account "Supplies and Expenses—General Office" for the reason that at the time Judge Hand considered the case, there was no preferred stock department and the elimination was necessary to make the figures correspond with those used by him.

(2) Account "Miscellaneous General Expenses." (a) One-third of meeting fees, $76,196.66. There can be little question that the amount paid by the Consolidated Gas Company to its directors for their attendance at directors' meetings was to a certain extent for purposes other than those of the Consolidated Gas Company as a gas company, serving its own consumers alone. The Consolidated Gas Company is a holding company and its directors had to direct not only all of the gas business of the Consolidated and its affiliated companies, but all of the electric business of its subsidiary electric companies.

(b) Special expense. The amount of $21,000 it is earnestly contended, should not be included in the distribution expenses. This amount is made up of various vouchers, all of them apparently

for special retainers in various franchise tax and other litigations which were of an extraordinary character and will not probably recur.

(3) Uncollectible bills $110,743.41. The gas company under the law has a right to exact the two months' deposit from each and every consumer, and it is the appellant's contention that having this right and the extraordinary power to cut off gas long before the two months' are up, it shows a lack of diligence for such company to have uncollectible bills.

In the case of Reno Power, Light and Water Company v. Public Service Commission of Nevada —P. U. R., 1923 E, 485—District Judge Farrington, speaking of uncollectible gas bills (p. 500):

> "(12) Bad debts cannot be considered in determining whether rates are confiscatory, except upon satisfactory evidence that the company was in no wise at fault.
>
> Mr. Seaborn testifies (Trans., pp. 217, 211) that it is the custom of the company 'to require a deposit equal to the estimated two months' bill of the customer.' This being the custom or the rule, in the absence of any explanation as to why these bills were not collected, the only conclusion is that bad debts were due to negligence on the part of the company. The item cannot be allowed."

These three deductions total $228,036.09, or an amount per M cubic feet sold of .95 cents.

We prefer, however, to be conservative and make deductions in our calculations only for the items actually falling under Judge Hand's opinion. We therefore disregard these three last items.

Deducting the amount of $859,860.59 from the distribution expenses gives $6,312,350.59, which is

equivalent to a cost of distribution of gas of 26.24 cents per M, which approximates the figure of the little Kings County Lighting Company (26.89 per M).

Obviously, with the best will in the world, nobody can unscramble the misleading conglomeration of figures which purport to show the distribution expenses of the company as distinguished from the System.

Of the amounts claimed by the defendant Attorney-General as properly deductible from the distribution expenses of the appellee, the Master has deducted the gas supply inspection, interest on consumers' deposits, return on property used, interest on unpaid taxes and rate case expenses, including the hearings before the Public Service Commission. He has refused however to follow Judge Hand in reducing the overheads carried by appellee for the entire System.

Certainly it seems that the figure of 26.24 cents per M which approximates the Kings County Lighting Company figure (26.89) is ample to cover distribution expenses. The figure found by following Judge Hand is but a little more than a cent lower than the Master's figure which is unquestionably far to high.

The Court in confirming the Master's report indicated that rate case expenses should not have been excluded from operating expenses. The impropriety of this expression has been assigned as error and, although the Court below expressly stated that it did not decide the question (p. 319), the question will be treated in our rely brief if any contention is made by appellee that the Court below added this sum to operating expenses.

Taxes.

From the account "Taxes" as shown by plaintiff's books, the Master has deducted a proportion of the gross earnings taxes and has also deducted the excess dividend taxes as well as the taxes known as the real estate of corporations taxes, and the interest on unpaid taxes. He has failed, however, to deduct the large taxes on the 14th Street and the 42nd Street plants which should not be charged to the consumers, particularly when the Court is attempting to ascertain the future result of the statute in the litigation.

The 14th Street and the 42nd Street plants were found by Judge Hand not to be used and useful in 1919, and taxes on them were deducted (Consolidated v. Newton, supra, p. 258). These plants were antiquated plants and while the Master here finds they were suitable as reserve plants, yet it is apparent that they were not used as reserve plants, for they were never called into use from the winter of 1919-1920 up to the present time. Coal gas plants are not suitable for reserve plants as it takes one week to three weeks to get such plants in operation (p. 1168) and reserve plants are, as their name implies, necessarily such plants as may be put immediately into operation. Cold waves which attack plant capacity do not give a week's warning, neither do catastrophes such as earthquakes or fires which are apt to make the company call upon its reserve.

Moreover the Court below has included taxes on these plants even for the year 1924 when the evidence is that the land was sold and the plants scrapped in October 1923. Certainly, with a view of the future, and this must necessarily be the viewpoint in a rate case, these real estate taxes, amounting to $149,729.30 (pp. 2338-2339) should be deducted.

This will bring the Master's figure of 10.02 cents for 1923 down to 9.40 cents, as the cost of taxes for the Consolidated Gas Company.

A summary of the net cost of production and distribution of gas, then, is as follows:

Cost of Production	45.07¢
Cost of Distribution	26.24¢
Taxes	9.40¢
Renewals and Replacements	3.50¢
Total	84.21¢
Deducting miscellaneous revenue	8.48¢
Net Cost	75.73¢
Available for return	24.27¢

These figures on sales of 24,057,694,000 cubic feet of gas gives an amount available for return of $5,838,802, which is equivalent to a 6% return on $97,313,366. The proper rate base, as has been shown is not more than $84,000,000.

As has been stated above the company fixed its own rates in 1921 and 1922. In 1921 it was content with $4,404,000 and in 1922 with $5,935,000. The return shown above is considerably more than the average of the two years mentioned.

POINT III.

The Court below committed error in holding that no deduction from rate base should be made for accrued depreciation, including inadequacy and obsolescence. The failure of appellee to make proof of depreciation leaves its case incomplete and constitutes a failure of proof. The case should be sent back for proof on this subject. In default of this, a sum of not less than $12,000,000 should have been deducted.

The appellant contends that the Court and Master erred in not making any allowance for depreciation in the property of the appellee, and has made Assignments of Errors accordingly (Assignments of Error Nos. 15, 16, 20, 21, 22, 34, 36, 37, 41, 59; Record, pp. 327, 351).

The Master made no allowance whatsoever for depreciation. He said in his opinion (p. 132):

> "Accrued depreciation: As I have already said, I have made no deduction from, or in, the amounts found by me for the reproduction cost of the property or its value for the purposes of this case, for any so-called accrued depreciation, but I have deducted the amounts shown by the uncontroverted evidence to be required to be expended to put the properties used by the plaintiffs 'in a condition equal to new.' My reasons for these conclusions I have set forth in my Opinion in the New York and Queens Gas Co. vs. Prendergast, No .1 Federal Report, 2nd Series, pages 351-365. It has been confirmed by Judge Winslow in the final decree entered by him in that case and quoted in P. U. R. 1924 E, at page 59."

The Master in his decision above referred to (p. 367), after quoting at length from the decision of Judge Hand in Consolidated Gas Company v. Newton (*supra*), and the decision of another Master in Bronx Gas & Electric Company v. Public Service Commission, P. U. R., 1923, A., 255, said:

> *"The plant and property of the plaintiff having been maintained in a condition where it operates as efficiently as when new, I see no reason why an allowance for deterioration should be made.* (Italics ours.)
>
> "In view of these facts, I am unable to find any accrued or 'straight-line' depreciation, as it is sometimes called. I have deducted the amount Mr. Burt and Colonel Miller testified would be required to put the property in as good condition as new as showing *the amount of the renewals and replacements necessary to be made in the so-called regular course of its business from future earnings* and because, as I already stated, they had based their appraisal on reproduction of the plant 'new' and stated that these amounts would be necessary to put it in that condition."

That these rulings are directly contrary to the decisions of this Court is too plain to admit of argument.

Certain utilities, though by no means a majority, have during the past two decades been industriously urging the view expressed by the Master and approved by the lower Court in this district. It is known as the service efficiency theory.

Unfortunately for the proponents and advocates of this view they have never received the approval of their theory by this Court. Indeed this very theory has been already passed upon and disapproved in

Minnesota Rate Cases, 230 U. S., 352, 456.

Here the Court said:

"The Master allowed the cost of reproduction new without deduction for depreciation. It was not denied that there was depreciation; in fact, as the Master said, 'everything above the roadbed depreciates from wear and weather stress' (p. 457). It was said that 'a large part of the depreciation is taken care of by constant repairs, renewals, additions and replacements, a sufficient sum being annually set aside and devoted to this purpose * * * fully offsets all depreciation and renders the physical properties of the road not less valuable than their cost of reproduction new.' *We cannot approve this disposition of the matter of depreciation.* It is also to be noted that the depreciation in question is not that *which has been overcome by repairs and replacements,* but is the actual existing depreciation in the plant as compared to the new one. It would seem to be inevitable that in many parts of the plant there should be such depreciation, as for example, in old structures and equipment remaining on hand. And when an estimate of value is made on the basis of reproduction new, *the extent of existing depreciation should be shown and deducted* * * * when particular physical items are estimated as worth so much new, if, in fact, they be depreciated, this amount should be found and allowed for. *If this is not done, the physical valuation is manifestly incomplete.* And it must be *regarded as incomplete in this case.*" (Italics ours.)

The doctrine that depreciation always is a factor in ascertaining value has been so many times stated and approved by this Court that it is only necessary to cite some of the cases in which it has been involved.

The leading case is Knoxville vs. Knoxville Water Co., 212 U. S. 1, where the Court said (p. 10):

> "The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property, like real estate for instance, depreciate not at all, and some times, on the other hand, appreciate in value. *But the reservoirs, the mains, the service pipes, structures upon real estate, standpipes, pumps, boilers, meters, tools and appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use.*" (Italics ours.)

Also in Kansas City S. R. Co. vs. U. S., 231 U. S. 413, the Court said, at page 448:

> "This in effect ignores depreciation,—an inevitable fact which no system of accounts can properly ignore. A more complete depreciation than that which is represented by a part of the original plant that through destruction or obsolescence has actually perished as useful property, it would be difficult to imagine."

See, also:

San Diego vs. National City, 174 U. S. 739.
San Diego vs. Jasper, 189 U. S. 439, 442.
Stanislaus vs. San Joaquin, 192 U. S. 201, 215.
Minnesota Rate Cases (supra).
Des Moines vs. Des Moines, 238 U. S. 153.
Denver vs. Denver Water Co., 246 U. S. 178.
Galveston vs. Galveston, 258 U. S. 388.
Southwestern Bell Co. vs. P. S .C., 262 U. S. 276.

Brush Electric vs. Galveston, 262 U. S. 443.
Pacific Gas vs. San Francisco, 265 U. S. 403.

Its deduction has also the approval of the state public utilities commissions generally. Some of the recent cases are:

Freeport vs. Nassau Lighting Co. (N. Y.), P. U. R. 1924 A. 96.
Re Omaha Railway Co. (Nebr.), P. U. R. 1924 A. 627.
Re Springfield Gas Co. (Mo.), P. U. R. 1924 A. 613.
Re Indianapolis Water Co. (Ind.), P. U. R. 1923 D. 449.

The question is of great importance, particularly in this case.

Counsel for appellee has taken a leading part in developing the service efficiency theory and his success in the lower courts about New York have emboldened him to hope that this Court may finally be persuaded to abandon its settled views on this subject. He has made no secret of the fact that this Court is groping in darkest error on this important subject and is only awaiting his appearance to see the light.

In his brief submitted in the case of New York and Queens Gas Co. vs. Prendergast (*supra*), he says, in bold print (p. 128):

> "The sound determination of the question of so-called 'depreciation' is of the utmost importance to all public utilities and their investors, in New York City and throughout the United States."

He then continues:

> "To the plaintiff and other gas companies in New York City, the most important consideration, in connection with questions of valuation, is that no countenance or support be given, by any manner of means, to the making of any deduction for any manner of so-called 'depreciation,' in the ascertainment of the present value of the properties of public service companies.
>
> "This is the most vital issue, in the field of utility valuation, which has not yet been unmistakably and finally passed upon by the United States Supreme Court.
>
> *"Until the question is finally and soundly passed upon by the highest Court, it is of the utmost importance that the matter shall be soundly dealt with and determined, in every case arising in the lower Courts."* (Italics his.)

The inference is clear. This Court is not yet "sound" on this question. Counsel for appellee disagrees with the views of this Court. Therefore the lower Courts must take counsel's side against the view of this Court.

The startling thing is that the lower Court in the Southern District of New York at least has done exactly this. It has followed counsel for the gas companies rather than the Supreme Court of the United States. It needs no argument to prove that this course is erroneous and counter to every conception of respect for higher authority.

Nor does counsel attempt to conceal his realization of the fact that this Court has consistently approved substantial deductions for depreciation, for he says in the same brief (p. 150):

"It is true that, in several opinions of the Supreme Court subsequent to the decision in this plaintiff's case, reference has been made, in reviewing the proofs on either side, to 'cost to reproduce less depreciation.' Those were cases, coming up from the South-west, on obviously unsound and inadequate preparation, in which counsel for *both* sides had admitted or proved deductions for 'depreciation.'"

The affecting modesty of counsel, who comes from the "North-east" and his confidence, strangely shared in by the lower Court, that when his sort of "sound" and "adequate" preparation is viewed by this Court the change will be immediate, needs no comment.

Depreciation is of course a fact decreed by natural laws and human progress. "Moth and rust corrupt." The old methods give place to new. A vivid statement of the underlying law that necessitates consideration of depreciation is found in *People ex rel. Brooklyn Heights R. R. Co.* v. *State Board of Tax Commissioners*, 69 Misc., 646, at page 656. There the Court said:

"As surely as humanity travels to the grave, the machinery and equipment of a public service corporation travel toward the scrap pile. The plant and structures depreciate in less degree, but as certainly. This is ordinary depreciation.

"But another form of depreciation in the case of properties here being valued takes place. The machinery or equipment, while still capable of years of service, becomes inadequate to do the work demanded—not only by the corporation, but by the law itself. In the case particularly of electrical machinery, the type becomes obsolete by reason of inven-

tion, and increasing public demands frequently required in aid of safe and adequate service that the obsolete appliance or equipment give way to the new. * * *"

Depreciation is defined by the Interstate Commerce Commission in its rule as follows:

"(a) The losses suffered through the current lessening in value of tangible property from wear and tear (not covered by current repairs).

"(b) Obsolescence or inadequacy resulting from age, physical change or supercession by reason of new inventions and discoveries, changes in popular demands or public requirements, and

"(c) Losses suffered through destruction of property by extraordinary casualties."

The three elements stated in the Court decision quoted as well as in the rule of the Commission are fundamentals of depreciation, namely:

1. Such wear and tear and natural decay as is not covered by current maintenance.

2. Lessening of value by reason of inadequacy.

3. Lessening of value by reason of obsolescence.

Appellee has taken great comfort from the recent decision of this Court in Pacific Gas and Electric Company v. San Francisco, 265 U. S., 903, which it claims holds that observation is the only test of depreciation.

Such determination of depreciation by observation is particularly welcome to a gas company whose property is largely underground where it

cannot be observed. In such a case it is not hard to hire observers whose senses are not particularly keen.

However, while appellee hails this decision as indicating a change in view on the part of this Court yet it by no means subscribes to this method or any other method of determining depreciation. On the contrary, it absolutely and totally denies that depreciation exists.

The testimony offered is not testimony as to the amount of depreciation.

There is no recognition of anything more than necessary current repairs unexecuted at a given date.

The total amount of these maintenance charges is infinitesimal. In the case of the property of the Consolidated Gas Company, the amount necessary to put the property in a condition as if new is $531,000 on a total reproduction estimate of $113,642,000 (Record, pp. 186-187). In the case of the Astoria Light, Heat & Power Company, this amount is $468,392 on a total reproduction estimate of $28,461,000 (Record, p. 189). In the case of the property of the East River Gas Company, no deduction whatever was made for this item from a total reproduction estimate of $8,266,000 (Record, p. 189), and in the case of the Standard Gas Light Company, no deduction was made for this item from a total reproduction estimate of $353,000. In other words, the Master found a total reproduction cost, as of June 1st, 1923, for all the properties of the Company, of $162,559,000 (Record, p. 191), and deducted a total of about one million dollars for "necessary amount to put property in a condition as if new," or about 6/10th of 1%.

The figures above show that there was no *bona fide* effort to determine depreciation by observation. There is merely a denial of depreciation and ap-

pellee is consistent in its theory. In its brief in the Court below it took exception to the deduction of even the negligible amounts testified to (p. 229), it maintained this saying that "The Special Master should not have deducted *the sums* proved by the plaintiff *as the current cost of restoring the property to a condition as if new.*" It cites as its authority New York and Queens Gas Company v. Newton, 277 Fed., 285, 287, where the Court refused to deduct similar allowances which it termed "an unmatured obligation to maintain the property in efficient operating condition out of future rates."

No where are the insignificant amounts above mentioned described as or claimed or admitted to be depreciation.

Yet the record here is replete with evidence that the property of the plaintiff is constantly wearing out through use, is constantly becoming inadequate and is constantly becoming obsolete.

The properties of the Consolidated Gas Company are very old. Prior to 1884 when the Consolidated was formed there were seven independent companies in New York City, each operating under separate charters granted at different times between the years 1823 and 1871. They were fully equipped, having the necessary buildings, plants, machinery, holders, etc. The value of the physical property taken over was appraised at $30,000,000. Since 1884, there has been property retired aggregating about $16,173,000 (Record, p. 2818), leaving still in use $14,090,000 of the property acquired in 1884 (Record, p. 2818). This $14,000,000 of property including $6,000,000 of land, is therefore aged from forty-two to one hundred and three years. There is also a substantial amount of property acquired in 1923 from the Mutual Company which is as old.

This Court in Willcox v. Consolidated Gas Com-

pany (212 U. S., supra, p. 48), fixed the value of the company's properties, as of 1906, in the amount of $55,000,000. At least $33,000,000 of the property which the Company possessed in 1906 is still being used by the Consolidated Gas Company, and was valued in this case (Public Service Commission Report 1923, Def. Ex. 54, p. 2980).

Moreover, there is evidence in the record that the property is constantly wearing out from age and use alone. While a particular piece of equipment may be working well today, its usefulness is about finished.

For instance, the company had 613,102 meters on June, 1923 (p. 776), which were valued by the experts at their cost to reproduce new. Yet the record shows that numbers of these meters are condemned monthly and regular reports of those condemned are kept by the accounting department and there were withdrawn from service from 1919 to 1923 meters costing $395,207 (p. 2986).

It is recognized by the company that mains are damaged by electrolysis and must be taken up (Woods, p. 1229).

Chief Engineer Woods speaks of a flywheel that "got tired and quit" (p. 1188).

All of the elements of the property are "tired" from age and use. From this cause alone the lessening in value is great.

2. Inadequacy is a constant factor in lessening the value of the property of appellee.

Take for instance the mains of the company.

The history of the 2, 3 and 4 inch mains shows how inadequacy lessens value. In 1884 the Consolidated Gas Co. acquired at the consolidation 42,508 feet of 2 inch mains, 837,377 feet of 3 inch mains and 893,251 feet of 4 inch mains. On De-

cember 31st, 1923, the company had on hand only 4,341 feet of 2 inch mains, 101,114 feet of 3 inch mains and 650,042 feet of 4 inch mains (Pft's. Ex. 822, p. 2343, fols. 3372-3383). When the company acquired the Mutual Company in 1922, it took over 316,667 feet of 4 inch mains. Excluding this figure therefore, the 4 inch mains of the company total 333,375 feet. In other words the company since 1884 has retired about 90% of its 2 inch mains, 86% of its 3 inch mains and 63% of its 4 inch mains. The reason for this is self evident. Mains of these small sizes do not give economical service in the City of New York. Large mains are gradually being substituted for the smaller ones.

The table of mains withdrawn and laid points to one great lesson. Inadequacy in a changing, growing city is a serious factor. The four inch mains will give place to six inch, the six to eight and so on. No main is permanently adequate.

The same can be said for services. In the old days ¾ inch services were the rule. Now services run to as much as 6 inches in diameter and none are laid less than 2 inches in diameter? Surely the remaining small services are seriously depreciated through inadequacy and the larger ones as well to lesser extent.

3. Obsolescence is a serious factor.

We have already noted the results of obsolescence as reflected in the cost of producing gas in the plants in Manhattan as compared with those at Astoria. Of course the outstanding example appears in the 14th and 42nd Streets coal gas plants. These were "antiquated" twenty years ago.

On June 1, 1923, and apparently on September 30, 1923, these plants were, according to the Court below "as good as new (p. 92). Their value was not subject to any deduction for obsolescence, de-

preciation or inadequacy. On October 1, 1923, however they were dismantled and "sold as scrap" (p. 421). Miller valued them without land at $3,679,058 (p. 2800, fol. 4111). The Master allowed about $3,000,000. These figures are as of June 1, 1923. The theory of the Court below apparently is that up to the minute that a plant is pronounced obsolete and withdrawn it has suffered no diminution in value. On the day it is withdrawn its whole value vanishes.

Quite plainly obsolescence begins to lessen value as soon as there is a change in the art.

Under the Court's theory inadequacy and obsolescence actually increase value instead of lessening it.

Besides the striking instance of the 14th and 42nd Streets plants many other instances can be shown of property which is in fact inadequate and obsolete. Yet such property bears a value in the opinion of the Court below actually higher per unit of capacity than new and up-to-date properties.

The old, small holders owned by this company furnish an additional example of inadequacy due to changed conditions. The company has in operation today seventeen gas holders. The 1923 annual report of the appellee to the Public Service Commission of the State of New York (Deft.'s Ex. 54), and Col. Miller's Exhibit (Plt.'s Ex. 838, Rec., p. 2406) show the capacity of these holders, their age, reproduction cost. The cost per cubic foot as estimated by Col. Miller.

COMMERCIAL GAS HOLDERS.

Location	No.	M. Cu. Ft. Capacity	Year Installed	Reproduction Cost June 1, 1923	Cost Per Cu. Ft
12th St., Ave. D	1	4,230	1897	$562,880.44	$.133
12th St., Ave. D	1	5,000	1907	600,472.00	.120
12th St., Ave. D	1	5,000	1904	582,631.56	.117
15th St., East River	1	3,250	1888	372,995.35	.115

21st St., East River	4	1,600	1884	586,123.77	.366
21st St., East River	1	1,500	1870	404,485.01	.2696
44th St., North River	4	1,520	1880	509,293.96	.335
44th St., North River	1	2,000	1880	564,727.97	.282
63rd St., Ave. A	1	5,000	1923	614,571.19	.123
65th St., West End Ave.	1	4,000	1892	603,663.59	.151
65th St., West End Ave.	1	4,000	1900	589,319.80	.147
99th St., 1st Ave.	2	1,200	1880	298,922.16	.249
111th St., 1st Ave.	2	10,000	1902	937,934.79	.0938
132nd St., 12th Ave.	1	5,000	1905	464,506.19	.0929
Fordham Road	1	10,000	1912	929,177.21	.0929
Astoria	1	15,000	1907	1,207,331.69	.0805
"	1	15,000	1922	1,225,457.70	.0817
		93,300		$11,054,494.38	

The tremendous growth of the City of New York in the last half century has brought about a decrease in the efficient and economical use of the old holders, compared to the more modern and very much larger ones, and has made the use of the old ones almost prohibitive. They occupy land of great value; fewer and larger holders will enable the company to dispose of the land sites of the smaller holders, at a great profit to the company. These small holders were estimated by witness Miller at reproduction cost today, and yet no deduction was made by reason of their inadequacy. The results of such a calculation give rise to startling figures.

For example the holders installed prior to 1888, show a reproduction cost according to Col. Miller of 36.6¢, 26.9¢, 33.5¢, 28.2¢ and 24.9¢ per cubic foot respectively as against a reproduction cost of those installed since 1900 of 9.3¢, 9.2¢, 9.2¢, 8.0¢ and 8.1¢ per cubic foot. In other words the old holders show an average cost of 29.8¢ *per cubic foot* as against 8.7¢ *per cubic foot* for the modern holders.

These excessive reproduction costs of small, inadequate and obsolete holders were totalled *without any deduction or allowance for depreciation!* We do not believe that this Court will stamp with

approval any such method of calculating a rate base the result of which would be to make consumers pay exorbitant rates based on a valuation for old inadequate property three times as high as the company's valuation for its modern efficient property of the same type.

The equipment of the company, including furniture, fixtures, tools, implements, automobiles, etc., were valued by the Court and Master at what these properties cost when new. These items total about $1,350,000 (Master's Opinion, pp. 118 and 119). The furniture is old, the automobiles very much used, and the tools none the better for wear and age. Common experience dictates that in articles of this character there is a very decided depreciation due to age and use—*yet no deduction was made from their cost new.*

Thus one who is not for the lessening of value for inadequacy and obsolescence is necessarily for actually increasing value on that account. That follows as an inevitable result. Such a theory does not stand the test of reason. The theory of the Court below is the direct autithesis of that announced in this Court in the Pacific Gas & Electric case (supra). There this Court would not allow the company to be penalized for having efficient and up-to-date plants. In this case the Court holds that it must be rewarded and the consumers penalized because plants are old and efficient.

In default of proof as to depreciation the case should be sent back for further testimony to be taken. In default of this the company's own estimate of $12,000 000 should have been deducted from the rate base.

Under the doctrine of Minnesota Rate Case (supra), it is earnestly contended that the proof in

this regard is incomplete and the case should be sent back for further testimony.

If this Court is reluctant to do this in view of the time and effort already spent it should be pointed out that the appellee itself set up a measure of depreciation.

It has accumulated a huge fund originally meant "to cover deterioration, renewals, extraordinary wear and tear, replacements and other contingencies." The balance in this fund amounts to $11,801,659.48 (Public Service Commission Report 1923). In the absence of any other proof on the part of the appellee as to depreciation in its property, the Court may very well accept this figure as a fair measure of such depreciation.

In our brief in the Brooklyn Union case we traced the complete history of a similar fund. We shall therefore but briefly set forth here the development of this fund in the instant case.

On the 31st day of May, 1905, the Executive Committee of the Consolidated Gas Co. adopted a Resolution, which was approved by its Board of Trustees, authorizing a charge each month, as a part of operating expenses, of 10 cents per M cubic feet, and directed that same was to be credited on the books of the company as a fund called "Renewal and Contingency." We submit the Resolution in full, as follows:

> "Resolved, that the officers be and they hereby are authorized and directed to charge each month as a part of the operating expenses of this company, *an amount to cover deterioration, renewals, extraordinary wear and tear, replacements and other contingencies equal to* 10 *cents per* 1,000 *cubic feet of gas sold to general consumers each month,* the same to be credited on the books of the company to 'Renewal and Contingency.' No charges against

the said account or appropriation of the fund so established shall be made, except by authority of this Committee." (Italics ours.)

This is the "10 cent item referred to at length by Judge Hough in Consolidated v. N. Y. (supra, p. 864).

Under and pursuant to this Resolution, $9,846,737.58 was collected up to and including the year 1914. We annex a table showing the accumulations in this fund in the respective years:

1905.....	$1,046,096.70
1906.....	2,333,552.40
1907.....	3,312,905.89
1908.....	4,295,776.55
1909.....	5,461,632.20
1910.....	6,509,534.13
1911.....	7,637,612.64
1912.....	8,655,194.56
1913.....	9,534,429.65
1914.....	9,846,737.58

In 1915 the title of the account "Renewal and Contingency" was re-designated "Contingency." $9,358,358 was transferred from the account "Renewal and Contingency" to the new account "Contingency," and it was provided that each month after December 31st, 1914, "there shall be credited thereto and charged to operating expenses an amount equal to 5 cents per M cubic feet of gas sold during said month."

From 1915 to 1918 this account was increased to the amounts set forth as follows:

1915.....	$10,142,349.95
1916.....	10,957,106.28
1917.....	11,801,659.48
1918.....	11,801,659.48

While this history does not appear in the record in the instant case it is all part of the record in this Court in the prior case of Newton v. Consolidated (supra, p. 18234).

It is apparent from the original Resolution creating the "Renewal and Contingency" fund that the moneys now in this account were charged to operating expenses for the purpose of providing for wear and tear or depreciation. A mere change in the name of the account after the money has been accumulated cannot alter its purpose. Moneys collected for depreciation purposes cannot be subsequently made something different by a mere change of name.

The sum of $11,801,659 does not exist today in the form of cash. It is quite impossible to point out exactly where each dollar of this fund has gone. There is no doubt, however, that all of the money is re-invested by the company in its plant and structures for additions, betterments, etc.

As Judge Mayer said, in the case of Brooklyn Union Gas Company v. Nixon (2 Federal, 2nd Series, p. 119), "the Contingency fund does not exist as cash. It has gone into the property in one form or another."

In fact, it is the practice of the public utility companies to re-invest the proceeds of this fund in their properties. In the case of the New York Telephone Co., a fund approximating $114,000,000 has been accumulated and all of it has been invested by the company in its own properties.

In 1913, Mr. Vale then President of the American Telephone and Telegraph Co. said, "The policy of investing the depreciation reserve in revenue-earning plants has continued, and the public is getting the advantage and use of a large amount of plant upon which no dividend or interest charges have to be met."

The appellee has done practically the same thing, but it contends that it is entitled to earn a revenue upon that portion of the plant which has been paid for out of the proceeds of this fund—accumulated out of the rates charged to consumers.

The Court and Master valued all of the properties of the company, including that portion which was purchased by the $11,801,000 collected from consumers for depreciation purposes. Not only do they desire that a dividend be paid upon this amount, but they go a step further—they attempt to predicate the unconstitutionality of a legislative rate upon a valuation of a plant including the portion paid for by the moneys in this account.

The theory upon which the company has accumulated this reserve is that an estimate can be made of the useful life of this property, and each year there was charged to operating expenses an amount estimated as the depreciation which had taken place during the year in the operation of the plant for consumers; or, in other words, the consumption of property used in the public service. *It is the company's own estimate of depreciation.*

In a very recent case in New York, in the matter of the New York Telephone Co. P. S. C. (Case, 1789), the majority opinion elucidated the principle involved:

> "If instead of reinvesting the reserve in plant the company had carried it in banks or in high grade securities there would be no question that it should not be included in the determination of a rate base. Interest upon this amount from banks or securities would have been credited to earnings or allowed as a credit to annual charges for depreciation. How is the situation any different when the reserve has been invested in property of the company?
>
> "Whether the reserves are invested in prop-

erty or elsewhere the investors are assured of a return upon the property which their invested capital has created. When the reserve is invested in property used in the service, the rate base should be the amount of investment of the owners plus the amount of reserves invested in property less the amount of the reserves. If the reserve is held in liquid assets the rate base is the amount of the property less the reserve. In both instances the reserve measures the accrued depreciation in the property.

"If this reserve had not been reinvested the plant acquired by its use would have had to be constructed with new capital. On this new capital a return would have to be had. No criticism is made of the company's reinvestment of this fund because it has provided capital for extension of plant and has employed the reserve undoubtedly to the best advantage. This has been the policy of the company, under which the reserves have been accumulated.

The Commission then quotes Louisianna R. R. Comm. v. Cumberland Telephone Co., 212 U. S., 414, where this Court stated:

"*It was obligatory upon the complainant to show that no part of the money raised to pay for depreciation was added to capital, upon which a return was to be made to stockholders in the way of dividends for the future.* It can not be left to conjecture, but the burden rests with the complainant to show it. It certainly was not proper for the complainant to take the money, or any portion of it, which it received as a result of the rates under which it was operating, and so to use it, or any part of it, as to permit the company to add it to its capital account upon which it was paying dividends

to shareholders. If that were allowable, it would be collecting money to pay for depreciation of the property, and, having collected it, to use it in another way, upon which the complainant would obtain a return and distribute it to its stockholders. That it was right to raise more money to pay for depreciation than was actually disbursed for the particular year there can be no doubt, for a reserve is necessary in any business of this kind, and so it might accumulate, but to raise more than money enough for the purpose and place the balance to the credit of capital upon which to pay dividends can not be proper treatment."

In the Brooklyn Borough Gas Company case, P. U. R., 1918, F., page 335, Judge Hughes said:

"The amount of the depreciation reserve has not been held in a separate fund, but has been invested in the plant and business, and the assets in which the depreciation reserve is invested are embraced in those which have been valued for the purpose of determining the rate base. Plaintiff thus has credit for all the property it uses in the public service and there is simply deducted the amount of its own estimate of the accrued depreciation in its plant, which is the equivalent of its reserve maintained by collections from consumers. * * * The plaintiff has maintained the reserve. The plaintiff's calculations of net income are made after allowing for the annual depreciation charged against operating expenses, and, in computing the annual return which would be allowed by the rate which the plaintiff attacks, the same deduction is made of the amounts collected to offset the estimated accrued depreciation."

The situation in the present appeal is identical. Unless this fund of about $12,000,000 is deducted from the rate base, consumers in the future will be paying dividends upon monies collected from them for depreciation purposes but not disbursed for this purpose. This Court specifically denounced this practice and its attendant results in the Cumberland case cited above.

Surely it would be most unfair to allow this company to value its old, obsolete property at tremendous prices while at least $12,000,000 of it has been built out of a depreciation fund at the expense of consumers rather than investors.

POINT IV.

The amount allowed for necessary working capital should not have exceeded $4,000,000 and should undoubtedly be much less. The Court below erred in allowing $5,900,000 for working capital.

The Master found the necessary working capital of the plaintiff in its gas business was at least $3,500,000 (Finding 98, p. 200).

He also found that the working capital required for the Astoria Light, Heat & Power Co. was least the sum of $3,000,000 (Finding 90, p. 196) (Finding 77, p. 188). He allocated (pp. 101, 119) $2,400,000 to the Consolidated Gas Company. The gross amount therefore was $5,900,000.

Working capital is the amount of cash, supplies and other available assets readily convertible into cash, without pecuniary sacrifice, reasonably necessary to be kept on hand by the company for the purpose of meeting its current obligations.

In re Chesapeake & P. Tel. Co., P. U. R., 1916, C., 925.

Although the matter was surrounded with an air of dignified mystery by the witnesses for appellee yet as a matter of fact the amount required for this element is easily susceptible of exact mathematical computation.

Working capital must be possessed by every business except such as are paid for their product before the proprietors have to pay either wages or raw material costs. Some of our greatest men have started as news-boys because this needs the least working capital. If they can arrange to pay for their papers at 9 p. m. and return those unsold they need no working capital. The fashionable tailor whose goods are sold on six months credit needs a working capital equal to six months wages plus the cost of goods necessary to be paid for before his bills for clothes are paid. If he has no credit he must pay for a six months supply of cloth. If he gets three months credit on cloth he will need working capital equal to but three months supply of cloth, for all goods bought in the second three months can be paid for out of payments for clothes.

These are the situations that present themselves in ordinary business and are solved by the ordinary business man every day. There is no mystery about it and no need of expert testimony. Similarly there was no need of expert testimony on this question in the instant case.

What is the situation of appellee in relation to its needs for working capital and how much should be allowed for this item?

The evidence shows that appellee does a business mainly on credit. There are some prepayment meters but even from these collections are not made immediately. No doubt they reduce, however, the average payment date of the outstandings. The evidence is that a certain number of meters are read each day (p. 1063) that the reading covers

about thirty days consumption (p. 1063) that bills are sent out about twenty days after the reading (p. 1063) and are paid on an average within 15 days (p. 1064). In other words as to each consumer the first days' consumption is billed 50 days after its consumption, and the 30th days consumption is billed 20 days after consumption. The average billing for each consumer is therefore about 35 days after consumption and gas is paid for 15 days later, or 50 days after consumption.

This being so it is obvious that the company, if it bought its materials and supplies for spot cash would have to have money to pay for materials and supplies for fifty days plus such a reserve as it is proper to carry. It would, whether it had credit or not, have to pay weekly wages for seven weeks and monthly wages for one month.

In so far as it had credit the necessary amount of working capital would obviously be reduced by the term of the credit. If the credit were 30 days it would have to have on hand only money enough to pay for 20 days materials and supplies. Anything bought after the 20 days would be paid for out of receipts at 50 days.

Money as money is not properly a part of working capital. Money is only the measure of what must be purchased with it.

The elements to be ascertained in working out this problem as to appellee are therefore these:

1. The necessary reserve of materials and supplies.

2. The credit terms on which materials and supplies are purchased.

3. The materials and supplies needed in the period represented by the difference between the 50 day period and the average credit obtained.

4. The weekly wages and the monthly wages, applicable to the 50 day period.

The testimony offered by appellee is most unsatisfactory and worthy of little attention.

The witnesses were three.

Witness Miller testified that working capital should be $6,900,000 (Plt.'s Ex. 856, pp. 2444, 2447).

Although the witness professed that he had made abstruse calculations it turned out that his estimate was based on the assumption that defendant-in-error needed 40 cents per M for all gas made and sold and an additional 20 cents per M for all gas bought and sold (p. 1573).

He looked into and analysed the reports as to materials and supplies on hand (p. 1573) but the result of the analysis does not appear. He was of the opinion that the company should have had on hand exactly "what it had" (pp. 1573, 1574).

He did not know and gave no consideration to the "terms of credit on which the company purchased its oil, or its coal, or its boiler fuel or its coke or its pipe" (p. 1575). He "did not know anything about terms of credit" (p. 1575).

This very serious omission of course discredits his testimony entirely. His own statement as to cash required was:

> "The second element covers the funds necessary to meet the payments incidental to the ordinary conduct of the business for the prompt payment of bills, in order to procure trade discounts or advance payments, which good business judgment makes necessary or desirable, as for the purchase of materials advantageously as to price, quantity and time" (p. 2447).

Yet he admitted that he did not "suppose the company would pay any earlier than necessary" (pp. 1575, 1576).

As by his own definition the company needed money only to meet its bills "promptly" but "not earlier than necessary" of course the credit terms were vitally essential factor for him to know.

He made no inquiry as to the monthly and weekly payrolls, another important factor (p. 1576).

He made no specific deduction from materials and supplies for such portion as might be for construction work (p. 1577).

Indeed it is quite plain from reading Col. Miller's testimony that he was merely performing his zealous duty as professional witness biased by his close connection with the company through the fact that he has for years been head of the Bartlett, Hayward Company which constructs most of appellee's plants (p. 1482) and would like to construct them all.

The only other witness who gave any figures was Mr. Brundage, chief of the accounting staff of appellee.

Brundage put in the record an agglomeration of figures but subjected them to no analysis so that his testimony is useless to show necessary working capital. He introduced an exhibit (Plt.'s Exs. 826, 827, pp. 2351, 2352).

His figures are as follows:

Cash needed	$2,000,000.00
Account receivable	2,187,409.74
Materials and supplies	1,650,763.25
Gas delivered but not billed	1,385,084.79
Total	$7,223,257.78

This is for the Consolidated Company alone.

It is hardly necessary to point out that these figures in and of themselves are quite meaningless. As has been said cash in and of itself is not a

measure of working capital. Its inclusion in such a table is merely a duplication of the other items. You need cash to pay for materials and supplies when the bills for them fall due. You need cash to pay for the cost of producing and distributing gas delivered and not paid for whether billed or unbilled. If you allow for these items there is no necessity for an additional allowance of cash.

He says as to this cash item of $2,000,000 that it is his "judgment of cash which the company should always have on hand for strictly gas purposes." He would say "that if our cash is any lower than that we should be very much alarmed" (p. 1047).

How much the state of mind of the Consolidated directors should be a guide for this Court is problematical. Suffice it to say, however, that the "alarm" must have been pretty constant for the actual cash on hand rarely equaled $2,000,000 (pp. 1059, 1060). And for "strictly gas purposes" it was assuredly very far less for the Consolidated has need for cash for many purposes other than gas purposes and receives it from many other sources, such as:

1. Moneys from profits on gas sales not yet distributed or passed into surplus.

2. Moneys for construction.

3. Moneys from dividends on stock and interest on bonds of other companies.

4. Moneys from sale of stock or bonds.

5. Moneys from repayment of loans or accumulated to make loans.

6. Moneys necessary to pay for material and labor used in work for other companies and not yet paid for by them.

Then again Mr. Bundage includes all materials and supplies whether for gas making, for construc-

tion or for work for other companies. Also in his accounts receivable he makes no deduction for the percentage which represents profits. Yet surely working capital does not increase with the profits a company makes. Bills receivable without analysis and without offsetting corresponding bills payable are obviously no measure of working capital. The bills payable he admitted averaged over $2,000,000 (p. 1067).

If we deduct from Bundage's estimate:

Cash	$2,000,000
Bills payable	2,000,000
1/3 accounts receivable and gas delivered but not billed representing profits	1,000,000
A total of	$5,000,000

We have a sum of $2,000,000 for the Consolidated alone without any deduction from materials and supplies for such as are used for construction and in work for other companies.

His estimate of working capital for the Astoria company is $3,280,000 (p. 2380) calculated in the same erroneous way. Here cash represents $500,000. The average accounts payable appear in the annual report to the Public Service Commission for 1923 (Deft.'s Ex. 54) as $1,475,000 at the beginning of the year and $1,200,000 at the end of the year. Probably they averaged over $1,000,000. If only $780,000 is deducted from this the working capital of the Astoria is reduced to $2,000,000 of which the Consolidated share would be $1,600,000. The total for the two companies would therefore be $3,600,000.

The final witness was the willing Allison who is ready with apt testimony on going value, working capital or what you will at any time. He gave

no figures but was certain that terms of credit have nothing to do with working capital (p. 1376). If a company has credit it is an asset on which the consumers should pay it 8% return (p. 1376). This is adding a novel element to a utilities valuation. If a company has credit it can come only from two circumstances namely: 1. The consumers pay their bills promptly and 2. the officials are honest and apply the consumers money to paying the company's bills.

It would indeed be strange to charge consumers more for gas because they pay promptly. It would be even stranger for the company to expect higher rates because its officials are honest.

Even the astute Allison became a trifle mixed in trying to make this point for he admitted that "the amount of cash necessary to have on hand depends to some extent, at least, upon the period which elapses between the delivery of the materials and the payment for the materials by the utility" (p. 1375). In other words his testimony was that working capital both did and did not depend on credit.

In fact the proof submitted by appellee was so meagre and paid so little attention to the analysis of the elements which actually fix working capital that it does not merit the Court's serious attention. In this as in other matters we are forced to rely to some extent on previous determinations. The situation, in fact has always been the same. In each of the prior litigations the facts testified to by the company's witnesses were so devoid of proper analysis that the Court was forced to use its reasonable judgment.

In Consolidated v. New York (supra), Judge Hough said on this subject (p. 859).

"Upon this subject, I am unable to agree

with the report, further than to express my belief that the complainant usually has on hand about $3,000,000 worth of bills receivable and cash, and some $616,000 worth of bills payable outstanding. But it does not follow that so large a proportion of its capital account should be entered as working capital. That phase means the amount of cash necessary for the sale and convenient transaction of a business, having regard to the owner's ordinary outstandings both payable and receivable, the ordinary condition of his stock or supplies in hand, the natural risk of his business, and the condition of his credit; and unless these matters, and perhaps others, be looked into, no comparison can be drawn between one business and another, or even between those of the same general nature. The security of complainant's business is fairly shown by the fact that for the time of inquiry, in a gross business of over $13,000,000, bad and doubtful debts amounted to less than $83,000, and final profits and loss adjustment less than $30,000.

"Complainant's credit is of the highest, and its own comptroller should, I think, be the best judge of its own necessities, and his measure of working capital in the sense of cash is $1,000,000. $616,000 is taken as a fair average of outstanding bills payable, and the aggregate of these two sums is as much as the comptroller claimed until on suggestion be added $2,000,000 thereto, represent the average amount of outstanding bills receivable. To assert that a concern with such credit as complainant, with small percentage of loss, and a plant completed and paid for, needs as working capital not only the amount of its average outstandings payable and $1,000,000 in cash,

> but enough more to make its average bills receivable equal to cash, is going too far. A fair working capital for complainant is $1,616,000, and that figure is adopted."

This amounts to a little over 12 cents per M on the then sales of 13 billion cubic feet per annum. On this basis the working capital now should stand at $2,900,000.

In the case of Consolidated v. Newton (supra), Judge Hand took a figure of $2,000,000 when sales were 19 billion per year. He said (p. 268):

> "For working capital I take two million dollars, not because I mean to fix any such sum, but as a conservative compromise between the plaintiff's figure of $3,800,000 and Maltbie's of $1,480,000. It is in fact probably much too low, and it is clear that in spite of his subsequent testimony Little meant originally to say that there was a fairly constant proportion between working capital and production. His figure of twenty cents which at that time he gave as a minimum is twice what I have taken here."

At Judge Hand's figure the working capital would now stand at about $2,500,000.

In view of the learning and industry applied by these two jurists on this question it would be certainly fair to rely upon their judgment in this exactly similar case, particularly as the Judge who reviewed this case in the Court below gave it no attention whatever.

Three million dollars would certainly be ample for working capital. The Court will be exceedingly generous if it allows the sum above contended for of $4,000,000.

POINT V.

In this case upon all of the circumstances there should be no separate and additional allowance made for "Going Value" as there is no historical basis for such allowance.

The Master allowed $9,000,000 for "going value," calculating this sum upon a basis of 10% of the value of the tangible property of the plaintiff as of December 31, 1923 (p. 103). He frankly states in substance that the question of arriving at a "going value" figure is perplexing and rather vague, admitting that the courts have practically ruled out what sometimes had been grouped under the terms "Undistributed Structural Costs" and "Pioneer Losses" (p. 101). Relying, however, upon the language in the case of *People ex rel., Kings Co. Lighting Co.* v. *Willcox,* 210 N. Y., 479 for definitive purposes, and the cases of *Mobile Gas Co.* v. *Patterson,* 293 Fed. Rep., 219, and *Streater Co.* v. *Smith,* 295 Fed., 385, 390, he finds the 10% figure as fairly representing "Going Value".

In the Kings County Lighting Company case, Judge Miller emphasises "Mistakes of Construction", "Substitution", "Economies", "Experiments", "Perfection of Organism" and "Solicitation", etc., as the elements that go to transform a "bare bones" company into an efficient working organization.

The appellant will show that few, if any, of the elements considered by Judge Miller in the cited case, enter into the instant case; that the history of the plaintiff company, together with the judicial determinations in rate cases, precludes any consideration of a separate allowance for "going value" when the property has already been valued as a going concern.

In both cases of the Mobile Gas Company and the Streater Company the peculiar history and circumstances surrounding the development of the plaintiff companies, the testimony adduced in each of the cases, etc., were different and these cases cannot therefore in any wise be considered as analogous or authority for allowing a separate allowance for "going value" in the instant case.

The theory upon which the courts have in some instances made a separate allowance for "going value" is based largely upon the fact that a company starts out with the "bare bones of a plant" and by the expenditure of time, labor, money and experience, "co-ordinates these bones in an efficient working organism and acquires a paying business."

In the instant case, however, the history of the appellee does not permit any reasoning along these lines. It took over the established business and properties of six independent gas companies that enjoyed a profitable and established business in the City of New York. Some of these companies which entered into the consolidation of the plaintiff company had been in business in this city for over fifty years. A great deal of the expense, therefore, of the so-called "going value" under the theory of the Kings County Lighting Company case relied upon by the Master, had already been incurred, as the Master properly says on page 48 of his opinion:

> "These constituent companies had installed over one hundred thousand meters and were selling in the neighborhood of four billion cubic feet of gas a year."

In the opinion of Judge Hough in the case of *Consolidated Gas Company* v. *City of New York*, 157 Fed., 849, at pages 871-881, he considers the

question of allowing for "good will" and "franchise values." He arrived at the conclusion that nothing should be allowed for so-called "good will" in the rate base, but that, in view of the history of the company particularly the issuance of $7,781,000 worth of stock upon the fixed value of franchise in 1884, at the time of the consolidation, a franchise value should be allowed. He accordingly valued the franchises at $12,000,000.

It is pertinent to note that at page 880 of his opinion he says:

> "It has not been overlooked that according to one of complainant's witnesses $7,781,000 'was considered to represent in 1884 the franchises and business and contracts and patents and good will—*everything in fact except the tangible property.*'"

It is undoubtedly the fact that the $7,781,000 included everything except tangible property, to wit: "Franchises," "good will," "going value," etc. To allow all franchise value and in addition $9,000,000 for "going value" is in fact duplication.

The Supreme Court of the United States, in reviewing the aforementioned case in Consolidated Gas Company v. City of New York, 212 U. S., 19, discussing the matter of intangible property, said at page 42:

> "A short history of the complainant, as to its incorporation and its capital, and the method by which the value of its franchises was arrived at, will render the further examination of the case more intelligible."

The Court then proceeded to outline the consolidation of the constituent companies, in 1884, resulting in fixing a franchise value of $7,781,000

Continuing on page 45, the Court said:

"The evidence shows that from their creation, down to the consolidation in 1884, these companies had been free from legislative regulation upon the amount of the rates to be charged for gas. They had been most prosperous and had divided very large earnings in the shape of dividends to their stockholders, dividends which are characterized by the Senate committee, appointed in 1885 to investigate the facts surrounding the consolidation, as enormous. The report of that committee shows that several of the companies had averaged, from their creation, dividends over sixteen per cent., and the six companies in the 1884 paid a dividend upon capital which had been increased by the earnings, as in the case of the Manhattan and the New York, of eighteen per cent., and, had it been upon the money actually paid in, it would have been nearly twenty-five per cent.

* * * * * * *

"The Committee, upon these facts, were of opinion that the valuation of $7,781,000 for the franchises was not more than their fair aggregate value.

Assuming, as the committee did, that the company would be permitted to charge the same prices in the future which in the past had resulted in these 'enormous' or 'excessive' dividends, it need not be matter of surprise that a franchise by means of which such dividends had been possibly was not regarded as overvalued at the sum stated in 1884."

Concerning "good will" the Court upheld Judge Hough, saying at page 52:

"We are also of opinion that it is not a case for a valuation of 'good will.' The Master

combined the franchise value with that of good will, and estimated the total value of $20,000,000.

"The complainant has a monopoly in fact, and a consumer must take gas from it or go without. He will resort to the 'old stand,' because he cannot get gas anywhere else. The Court below excluded that item, and we concur in that action."

We have quoted from this opinion at length in order to place before the Court the complete reasoning upon which in 1908 it allowed the intangible property item for franchises of $7,781,000. If the Court had found any peculiar facts or circumstances in the history of the company upon which to allow for "going value" as an element, separate and apart from the franchise value, it undoubtedly would have done so in view of the fact that the Court was reversing the District Court and finding the 80 cent rate constitutional.

In the litigation involving the constitutionality of the 80-cent Gas Law in 1920, Judge Hand, who wrote the opinion in the District Court made no allowance for "going value" but followed the figures in the prior case for franchise value.

In *Newton* v. *Consolidated Gas Co.*, 258 U. S., 265, the Supreme Court of the United States in affirming this decision, also made no separate allowance for "going value". In other words, this is the first occasion upon which either a court or a Master in any case involving the constitutionality of a rate of the Consolidated Gas Company has included in the rate base a separate item for "going value."

The Master recognized that little or no money was actually spent by the plaintiff company in the

developing or soliciting of new business since 1884.

At page 103 the Master states:

> "In a city such as this, while of course it is necessary and proper that efforts should be made, as they have been, to increase the sales of gas, it is also true that a *very considerable portion of its new business comes to it without cost or solicitation.*"

The position of this company differs materially from that of a company seeking to establish a new business in a smaller and less populated community.

The Master furthermore (p. 105) states that the evidence shows that the plaintiff company, has been reimbursed for its expenditures in extending its business; that all costs for advertising the advantages of the use of gas, gas appliances, instruction of consumers in its use, canvassing and soliciting business, etc., generally considered in fixing "going value" have been included by the plaintiff company in operating expenses.

At page 104 the Master also says:

> "I might hesitate to rest a decision as to the unconstitutionality of the statute fixing rates because confiscatory, on the inclusion of either going value or the value of franchises and rights."

The statement generally relied upon to sustain the proposition that going value is an element to be considered is the statement contained in the case of Des Moines Gas Co. v. Des Moines, 238 U. S., 153, 165, as follows:

> "That there is an element of value in an assembled and established plant doing business and earning money, over one not thus advanced, is self-evident. This element of

> value is a property right, and should be considered in determining the value of a property upon which the owner has a right to make a fair return; when the same is privately owned although dedicated to public use."

In reliance upon these two sentences in the one opinion, however, the company here and the utility companies generally disregard that portion of the opinion which reads as follows:

> "As pointed out in the Cedar Rapids case, if return is to be regarded beyond that compensation which a public service corporation is entitled to earn upon the fair value of its property, the right to regulate is of no moment, and income to which the corporation is not entitled would become the basis of valuation in determining the rights of the public. When, as here, *a long established and successful plant of this character* is valued for rate-making purposes, and the value of the property fixed as the Master certifies upon the basis of a plant in successful operation, *and overhead charges* have been allowed for in the sums already stated, it cannot be said, in view of the facts in this case, that the element of going value has not been given the consideration it deserves, and the appellant's contention in this behalf is not sustained."

It will be noted that in the foregoing case the overhead charges to which the Court referred were: (1) Promotion expenses; (2) Engineering overhead; (3) Accidents during construction; (4) Mistakes in construction; (5) General superintendence; (6) Interest during construction; and (7) Taxes during construction.

Allowances for all of the seven items just named have been made by the Master in the instant case as General Overhead during Construction (see pp. 115, 118 and 119, his opinion) as well as in the rate base calculated in Point I above.

This being the case and there being already an allowance of $7,781,000 for "franchises" which includes all intangibles the Master and the Court below were in error in making an additional allowance for "going value".

Moreover, in its proof as to the amount of going value, appellee, it appears quite conclusively, has run afoul of the opinion of the Supreme Court in the case of Galveston Electric Company case, 258 U. S., 382, 393. In that case the Court said:

> "The most important of these items is $520,000 for 'development cost.' The item is called by the Master also 'going concern value or value of plant in successful operation.' He could not have meant by this to cover the cost of establishing the system as a physically going concern, for the cost of converting the inert railway plant into an operating system is covered in the agreed historical value by items aggregating $202,000. These included, besides engineering, supervision, interest, taxes, law expenses, injuries and damages during construction, the sum of $73,281 for the expenses of organization and business management. The going concern value for which the Master makes allowance is the cost of developing the operating railway system into a financially successful concern. The only evidence offered, or relied upon, to support his finding is a capitalization of the net balance of alleged past deficits in accordance with what was said to be the Wisconsin rule. The experts calcu-

lated this sum in various ways. One estimate placed the development cost at $2,000,000; a more moderate estimate by the company's expert was $575,300; and the city's expert made a calculation by which he estimated this so-called cost at $212,452."

This Court refused to follow this reasoning, saying (p. 395):

"Past losses obviously do not tend to prove present values. The fact that a sometime losing business becomes profitable eventually through growth of the community or more efficient management, tends to prove merely that the adventure was not wholly misconceived. It is doubtless true, as the Master indicated, that a prospective purchaser of the Galveston system would be willing to pay more for it with a record of annual losses overcome, than he would if the losses had continued. But would not the property be, at least, as valuable if the past had presented a record of continuous success? And shall the base value be deemed less in law if there was no development cost, because success was instant and continuous? Or, if the success had been so great that, besides paying an annual return at the rate of 8 per cent., a large surplus had been accumulated, could the city insist that the base value be reduced by the amount of the surplus? Compare Newton v. Consolidated Gas Co., decided March 6, 1922, 258 U. S., 165, 41 Sup. Ct., 264, 66 L., Ed. ."

The Court therefore definitely held that where development cost had been included, as in this case,

by giving a value for "engineering supervision, interest, taxes, law expenses, injuries and damages during construction" and "the expense for organization and business management," there can be no allowance for "initial losses" which is the cost of attaching the business. Yet all of the testimony adduced in the instant case was as to the losses that would be incurred in attaching business. It is true that the testimony concerned the hypothetical losses due to attaching the business to a reproduced plant the size of the Consolidated in a city the size of New York, but that merely weakens and does not strengthen the force of the evidence. If the actual losses, actually ascertainable, incurred in attaching the business of a company is not a measure of value, how can the highly speculative and imaginative losses which might be suffered while attaching hypothetical customers to a hypothetical plant become a measure of value?

In Smythe v. Ames, we learn that the courts are to consider among other things "the present as compared with the original cost of construction." We learn from appellee that although the original losses due to attaching the business have no bearing upon the value of the company's property, yet the hypothetical losses, under conditions which can never exist, do become an element of value. Appellee's counsel in his brief before the Special Master modestly states in italics:

> "The proofs of going value which have been adduced before your Honor in the present case are the most comprehensive, complete, many angled, and legally unexceptionable, that have ever been presented to an American Tribunal."

If this is so, all that can be said is that any hope of any court basing a reasonable judgment as to going value on the basis of evidence and not of pure conjecture is extremely remote.

The witness Miller withdrew to the silences and came back to testify that the going vlaue of the Consolidated was $19,188,890 (p. 1562). He said quite blandly that he "reached that figure by multiplying the number of consumers the Consolidated Gas Company had on June 1, 1923 by $35.00" (p. 1562). This is the same Miller who multiplied annual consumption by 40 cents to get working capital. He also multiplied all the property by an assortment of cents and per cents to add millions for "overheads" (Plt.'s Exs. 856, 866X, 868, pp. 2443, 2538, 2642). He is a great multiplier. He was not able to "segregate his estimate" (p. 1563). He made many attempts but found it was "meaningless after it was done" (p. 1563). He assumed that the plant was newly built in 1923 and while the inhabitants of New York were using electricity, oil and coal for lighting and heating they had never used gas (p. 1569). Some of the expenses would be to "educate them in the use of gas" and to induce them to "change from electricity to gas" (p. 1569). Although "concessions" to get people to use gas was an important factor he admitted that the Consolidated makes no such concessions (p. 1571). Although he expected to start operations in the year of grace 1923 he expected that "practically none of the laborers would be familiar with the duties they were called on to perform (p. 1565) and they would damage the property to the extent of "many thousands of dollars" (p. 1565). Also their inexpertness would cause increased expenses of operation "because of the increase cost of materials used" (p. 1566). The customers would be so inexperienced in the use of gas that there would be "quite a little expense to keep them from burning gas so inefficiently as to become dissatisfied with the service" (p. 1572).

His lofty mind apparently envisaged the City of

New York as it is but inhabited by people who know about all modern improvements except gas. This they knew neither how to make or use. Towering above this welter of ignorance would stand Mr. Miller, filled with knowledge of how to make and use gas obtained perhaps from deep researches in Jersey City.

The Special Master in the Brooklyn Union case said of Miller's similar testimony in that case, "The hypothesis is so difficult to conceive and so contrary to general experience that the imagination falters." (Brooklyn Union Gas Co. v. Prendergast, 7 Fed., 2nd, 630, 657). It does more. It does falter and with it falters whatever faith one ever had in Colonel Miller's credibility.

The other two witnesses had their feet nearer the ground but their testimony as well as that of Miller is quite unbelievable and runs counter to the established rules of law.

Mr. Woods (pp. 1551-1561, 1646-1668) apparently adopts Colonel Miller's view of the new company in New York but he resorts to addition to obtain his result rather than multiplication. His items which total the impressive sum of $27,475,903 on the basis of reproduction value and $23,124,708 on the basis of investment are as follows:

	Basis of Reproduction value	Basis of investment as found in company's books
Cost of setting meters	$ 2,264,289	$ 2,264,289
Cost of installing appliances	5,482,540	5,482,540
Cost of canvassing, advertising, etc.,	6,579,048	6,579,048
Additional cost as result of new plant and personnel	2,893,013	2,893,013
Additional cost due to lesser quantity of gas sold per dollar of investment	10,257,013	5,905,818
Going value not less than	$27,475,903	$23,124,708

It is probably only necessary to say as to this theory that though elaborate, it is but an extremely speculative and highly imaginative calculation of early losses that might be suffered in the case of a company operating under circumstances that no human being ever has or ever will have any experience with. Moreover the first three items are strictly operating costs and could not under any circumstances be charged to capital account. These costs were collected from customers in the rates charged.

The final witness was Mr. Addicks (pp. 1593-1632, 1677-1686) who was a devotee of addition rather than multiplication. His figure of $25,000,000, however, he "checks" by multiplication as per Miller (p. 1600) and by other multiplications all of which prove that $25,000,000 is far too low. By multiplying replacement cost by 20% he gets $38,000,000 which being higher than $25,000,000 proves that $25,000,000 is low (p. 1600). By multiplying active meters by $40 he gets $22,000,000 without including many elements included in his $25,000,000 and which alone equal that sum (p. 1600). By multiplying annual gross revenues by 100% he gets $27,000,000 which again proves that $25,000,000 is low (p. 1601).

He reiterates ad nauseam his "opinion," based on "37 years experience" that $25,000,000 is the proper figure (pp. 1596, 1597, 1599, 1600, 1601, 1602, 1622). The hypothesis on which the witness worked was as contrary to all human experience, including that of Mr. Addicks, as well could be, and his estimate like Woods suffers from the two criticisms that it includes cost of setting meters which is an operating expense and speculative "early losses." He tries to avoid the latter criticism by stating, that he "has not dealt with the losses at all" (p. 1678). In his calculations, however, he deals en-

tirely with yearly "deficiencies" in income (pp. 1623, et seq.). The distinction is no distinction.

Counsel for appellee in his brief before the Special Master and before the District Court gave a tabulation of cases which he said justified an allowance of over 10% of the physical property as going value. Apparently it is on the basis of this table and in entire disregard of the testimony that the Master came to his final conclusion for he says that in view of the particular history of this company "many of the facts, figures and arguments advanced have no application to the present situation" (p. 103).

He then states that plaintiffs' investment as of December 31, 1923, approximates $90,000,000 and continues:

> "Although no definite percentage has been laid down as representing the measure of the "going value" of a public utility company, examination of the cases has shown that courts have generally found an amount approximating 10% of the sum found as the value of the tangible property, as fairly representing the "going value". (Mobile Gas Company v. Patterson, 293 Fed., 219; Streater Aqueduct Company v. Smith, 295 Fed., 385). In *some* of these instances the sum found as the value of the tangible property has been approximately the investment; in other instances a larger sum determined as the fair value; but the percentage of relationship has generally been about what I have stated."

While he refers to only two cases where on the particular facts about 10 per cent. was allowed yet in speaking of "some instances" and "other instances" he apparently had in mind the table referred

to and included in the brief below of appellee. This table was as follows:

GOING VALUE—COURT CASES

	Total Property less Going Value	Going Value	Going Val. %
(1) Pioneer Tel. & Tel. Co. v. Westenhaven, 118 Pac. 354 (1912), V-III C. L., 1709	$ 94,660.00	$ 18,932.00	20.00
(2) Knoxville v. Knoxville Water Co., 29 Sup. Ct. Rep. (1909)	538,000.00	70,000.00	13.01
(3) Newburyport Water Co. v. Newburyport, 168 Mass. 541; 47 N. E. 533 (1897)	235,000.00	40,000.00	17.02
(4) Gloucester Water & S. Co. v. Gloucester, 179 Mass. 365; 60 N. E. 977 (1901)	525,500.00	75,000.00	14.27
(5) Valparaiso City Water Co. v. Valparaiso, 69 N. E. 1018	59,996.00	26,710.00	44.52
(6) Venner v. Urbana Water Wks., 174 Fed. 348 (1910)	155,000.00	25,000.00	16.13
(7) Des Moines Water Co. v. Des Moines, 192 Fed. 193 (1911)	1,685,978.00	168,277.00	9.98
(8) Des Moines Gas Co. v. Des Moines, 199 Fed. 204 (1912)	1,940,928.00	300,000.00	15.46
(9) Public Ser. Gas Co. v. Bd. P. U. C., 87 Atl. 651; R. R. Vol. 4, p. 5 (1913)	3,675,964.00	1,102,789.00	30.00
(10) Norwich Gas & Electric Co. v. Norwich, 57 Atl. 746	530,000.00	60,000.00	11.32
(11) Galena Water Co. v. Galena, 87 Pac. 735	12,172.00	3,043.00	25.00
(12) Winona v. Wisconsin Light & Power Co., U. S. District Court, 276 Fed. 996; P.U.R. 1922 C, p. 471	436,460.00	23,289.00	5.34
(13) Omaha v. Omaha Water Co., 30 Sup. Ct. Rep. 615 (1910)	5,700,884.00	562,712.00	9.87
(14) Denver v Denver Union Water Co., 38 Sup. Ct. Rep. 281 (1918)	11,417,782.00	800,000.00	7.01
Total	$27,008,324.00	$ 3,275,752.00	12.13

Note: Column 2 plus column 3 is the total value of the property as found or assumed by the Court.

GOING VALUE—COMMISSION CASES

1	Physical Property 2	Going Value 3	Going Val. % 4
(1) Complaint of Parsons R. & L. Co., Kansas P. U. C. 1912; 1st K. P. U. C., p. 103	$ 126,120.00	$ 13,000.00	10.3
(2) Gately & Hurley et al. v. D. & A. T. & T., N. J. Bd. of P. U. C. (1913); C. L. 14, p. 89	5,959,460.00	797,800.00	13.4
(3) Brooklyn Borough Case, 2 P. S. C. R., 1st Dist., N. Y. 620 (1911)	1,054,978.00	180,000.00	17.1
(4) Application of Gainsboro T. & T. Co., George R. R. Com., Jan. 7, 1913	8,797.00	2,500.00	28.4
(5) Application of Fruit Belt Tel. Co., decided Apr. 22, 1913	23,893.00	4,778.00	20.0
(6) Public Service Gas Co. Case, 1 N. J. Bd. of P. U. C., Dec., 1912, p. 476	3,925,964.00	1,025,000.00	26.1
(7) In re Purchase Fond du Lac Water Co., 5 W. R. C. R. 482 (1910), (No Working Capital or Stores)	314,439.00	38,078.00	12.1
(8) In re Menominee & Marinette L. & T. Co., 3 W. R. C. R. 778 (1909)	98,074.00	11,926.00	12.2
(9) In re Cashton Light & Power Co., 3 W. R. C. R. 67 (1908)	3,339.00	412.00	12.3
(10) Superior Commercial Club et al. v. Superior W. L. & P. Co., 11 W. R. C. R., p. 1 (1912)	1,564,663.00	204,467.00	13.1
(11) Southwestern T. & T. Co., 8 Mo. P. S. C. 433 (1915)	8,183,250.00	316,750.00	3.9
(12) Union Electric Light & Power Co., 8 Mo. P. S. C. 167 (1919)	23,884,000.00	2,500,000.00	10.5
(13) W. St. Louis W. & L. Co., 4 Mo. P. S. C. 162 (1916)	1,575,732.00	49,268.00	3.1
(14) Wilkes-Barre Ry. Co., Pa. P. S. C., P. U. R. 1920 F, p. 681	6,278,000.00	612,000.00	9.8
(15) Appalachian Power Co., W. Va. P. S. C., P. U. R. 1919 D	9,000,000.00	1,500,000.00	16.7
(16) East Chicago v. East Chicago & I. H. W. Co., Indiana P. S. C., P. U. R. 1922-A, 213	1,379,000.00	150,000.00	10.9
(17) Utah Power & Light Co., Utah P. U. C., P. U. R. 1922-A	591,359.00	106,827.00	18.1
Total	$63,971,068.00	$ 7,512,806.00	11.7

Note: Item 3 includes interest and taxes.
Item 14 is on a depreciated reproduction cost base.

Appellee's counsel has always borne a reputation for carefulness and industry but apparently in this matter he has been neither careful nor industrious. The table—though he vouches for it—is not his at all but is taken bodily from an essay on going value printed many years ago not by a judge or an eminent lawyer but by an itinerant professional witness on public utility subjects named Allison.

It is the same ready Allison who appears so often in this case. He is an engineer for a small gas company in St. Louis, which probably accounts for the large percentage of commission cases from the middle west. It also probably accounts for the fact that the citations of court cases are given not in the official reports but in the Supreme Court Reporter for Supreme Court cases and in Atlantic North Eastern and so forth for state cases.

Apparently Judge Ransom has never examined the authorities he cites, for a great majority of them do not bear out his contention. Of the 17 commission cases there are four (Nos. 4, 5, 11 and 12) which can not be found in any library in this city.

In the only case cited from New York (No. 3) the commission specifically refused to allow anything for going value, saying:

> "In the Queens borough opinion, this matter was discussed at length. It was there held that no further amount should be added to the value of the physical property beyond what was included in development expense. *Value cannot be made by the duplication of titles or the multiplication of names.*"
>
> Baltz v. Brooklyn Borough Gas Co., 2 P. S. C. R., 1st D. N. Y., 620, 638.

This is exactly what the Attorney-General is contending.

The commission allowed $180,000 for development expense but nothing for going value.

Of the remaining 12 commission cases all but three were decided prior to the Galveston decision and of them six based going value on early losses (Nos. 7, 8, 10, 13, 15, 16); a seventh (No. 9) was a condemnation case and an eighth (No. 10) gave a figure which covered all intangible property including franchise value and development cost.

There remain therefore of the seventeen cases naively listed by counsel for the appellee only four which used a percentage figure for going value as that item is defined and contended for by appellee

The court cases cited similarly are weak as illustrations.

The Omaha case (No. 13) 218 U. S., 180, was a condemnation case, not a rate case, and the Court definitely held (p. 203) that decisions in such cases on this subject are not controlling in rate cases or *vice versa.*

The same applies to

Newburyport Water Co. v. Newburyport, 168 Mass., 541 (No. 3);

Gloucester Water & S. Co. v. Gloucester, 179 Mass., 365 (No. 4);

Norwich Gas & Electric Co. v. Norwich, 57 Atl., 746 (No. 10);

Valparaiso City Water Co. v. City of Valparaiso, 69 N. E., 1018 (No. 5);

Galena Water Co. v. City of Galena, 87 Pac., 735 (No. 11).

That exchange value or value for condemnation purposes is not the same as value for rate purposes and that the principles laid down in valuation cases

cannot be applied to rate cases is well settled. The distinction is forcibly stated in

> In re Manitowoc Water Works Company, 7 W. R. C. R., 71, 72,

where the Wisconsin Commission said:

> "The valuation placed upon utilities depends, to some extent at least, upon the purposes for which it is intended. For instance, in valuing utilities for the purpose of condemnation and purchase, many elements must often be taken into account which should not be given any consideration in valuations made for the purposes of rate making."

See also,

> Ames v. Union Pacific Ry. Co., 64 Fed., 165;
> Spring Valley Water Works v. San Francisco, 192 Fed., 137.

Returning to the Court cases cited by appellee, in Knoxville v. Knoxville Water Co., 212 U. S., 1 (No. 2), the District Court which had allowed $60,000, was reversed and the Court refused to grant the allowance (p. 9).

The Des Moines Gas case (199 Fed., 204 [No. 8]), and the same case in the Supreme Court (238 U. S., 153), is of course the outstanding authority for *making no separate allowance.*

The main difficulty with tables of this kind, however, even when accurately compiled is that they fail to take any account of the vast number of cases in which no special allowance for going value has been made.

A few of these cases, which have been personally examined and can be vouched for are the following:

Consolidated Gas Co. v. Mayer, 157 Fed., 849;
Willcox v. Consolidated Gas Co., 212 U. S., 19;
Knoxville v. Knoxville Water Co., 212 U. S., 1;
Jacksonville Co. v. Jacksonville, 286 Fed., 404. The Court in this case said:

"Going concern values are no longer allowable upon the question of confiscation of a utility company's property by the fixing of rates."

See also:

Des Moines v. Des Moines, 238 U. S., 153.

Here the Supreme Court said on going value:

"Included in going value as usually reckoned is the investment necessary to organizing and establishing the business which is not embraced in the value of its actual physical property. In this case, what may be called the inception *cost of the enterprise entering into the establishing of a going concern had long since been incurred.* The present company and its predecessors had long carried on business in the City of Des Moines, under other ordinances, and at higher rates than the ordinance in question established. For aught that appears in this record, these expenses may have been already compensated in rates charged and collected under former ordinances. As we have said, every presumption is in favor of the legitimate exercise of the rate-making power, and it is not to be presumed, without proof, that a company is under the necessity of making up losses and expenditures

incidental to the experimental stage of its business."

Cedar Rapids v. Cedar Rapids, 223 U. S., 655;
Cedar Rapids v. Cedar Rapids, 118 Iowa, 234;
Re Potomac Electric P. Co. (D. C.), P. U. R., 1917, D., 563;
Re Eaton Rapids (Mich.), P. U. R., 1922, D., 94;
Re Michigan State Teleph. Co. (Mich.), P. U. R., 1923, A., 30.

The commission in this case said at page 64:

"When a plant is valued as a going concern, and the cost of organizing the company, getting the money together to build it, engineering it, laying it out and constructing it, getting the business and putting it in operations are included, the prevailing practice of including therein a theoretical non-existent element of going value is indefensible."

See also:

Re Pontiac (Mich.), P. U. R., 1923, D., 193;
Re Trenton & Mesas County Tr. Co. (N. J.), R. U. R., 1916, B., 232;
Re Grafton Co. E. T. & P. Co., 4 N. H. P. S. C., 171;
Re Pawhunka Oil & Gas Co. (Okla.), P. U. R., 1917, D., 947;
P. S. C. v. Pac. Power & T. Co. (Wash.), P. U. R., 1915, A., 88;
Knowlton v. Fannington V. C. (Me.), P. U. R., 1918, E., 884;
Sandpoint v. Sandpoint W. & T. Co., P. U. R., 1915, F., 445.

And the following from the home state of counsel's mentor, Mr. Allison:

Meek v. Consumers E. T. & P. Co., P. U. R., 1915, A., 956;
Commercial Club v. Mo. P. U. Co., R. U. R., 1915, C., 1017;
Pine Lawn & West St. T. W. & T. Co., P. U. R., 1917, B., 679;
Thows v. Jefferson City L. H. & P. Co., P. U. R., 1917, B., 745;
Re Kansas City Electric L. Co., P. U. R., 1917, C., 728;
Springfield City Water Co. v. Springfield, P. U. R., 1919, D., 853.

These are but a few of the many that might be cited. If any average is to be taken, certainly the many zeros must be considered with the few and scattered 25 and 30 per cents.

But to decide one case by an average of other decisions is too patently improper to command respect or consideration. It is really an abdication of the judicial function on a difficult question. Each case has its own facts, circumstances, history, etc., and each must be decided upon those facts.

Knoxville v. Knoxville Water Co., 212 U. S., 15.

The facts here and the history of this company do not warrant any separate finding for going value.

POINT VI.

The statute in question should not be declared unconstitutional unless the Court finds that the rate of return would be less than six per cent.

The Court and Master found that the appellee should be permitted to earn at least an 8% return on the present value of its property (Rec., p. 140). In his opinion the Master said:

> "I find that 8 per cent. is a rate customarily required in the locality to be earned on the present value of the property of a regulated public utility, and that the plaintiff should be permitted to earn at least this amount."

The Court in its opinion said (Rec., p. 320):

> "It is also the Court's conclusion that at the present time a reasonable rate of return, according to well recognized custom in a regulated business like this, is not less than eight per cent."

The appellant duly filed assignment of error (p. 347, Assignment of Error No. 60).

Both the Court and Master mistook their duties in the premises. It was not their function to determine what rate of return should be allowed nor what a fair rate of return is. These are problems for the rate-making bodies. They should have confined their decision to a determination of what rate makes the statute clearly illegal because the property is being confiscated. They failed to note the distinction. Whether or not a rate of return to a public utility is sufficient to induce investors to risk their money in the enterprise, is within the discretion of the rate-making body. With this

question the Court and Master had nothing to do. They should have determined only what rate it was that endangered the safety of the enterprise. In order for the Court to interfere, the statutory rate had to be so plainly and palpably unreasonable as to make its enforcement equivalent to the taking of property for public use without compensation. There is a vast difference between this and the rate of return resulting in corporate profits, which would serve as a magnet to attract investors.

> San Diego Land & T. Co. v. Jasper, 189 U. S., 439.

This subject was properly treated by Judge Hand in the second suit—Consolidated Gas Co. v. Newton (*supra*). He summarized his conclusion by saying:

> "As the facts developed in this case I need not find any rate except to say that *less than six per cent. would be insufficient.*"

This same rate was impliedly accepted by the United States Supreme Court in Denver v. Denver Water Co., 246 U. S., 178.

In Dayton-Goose Creek R. Co. v. United States, a very recent case in the Supreme Court, 263 U. S., 456, Chief Justice Taft said:

> "The case of Bluefield Water Works and Improv. Co. v. Public Service Commission, 262 U. S., 679, is cited to show that a return of six per cent. on the property of a public utility is confiscatory. *But six per cent. was not found confiscatory in Willcox v. Consolidated Gas Co.*, 212 U. S., 19, 48, 50; in Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 C. S., 655, 670; or in Des Moines Gas Co. v. Des Moines, 238 U. S., 153, 172."

In Cedar Rapids v. Cedar Rapids, 223 U. S., 655, at page 670, the Court, through Mr. Justice Holmes said:

> "In this case the Court fixed a value on the plant * * * and estimated that under the ordinance the return would be *over* 6%. Its attitude was fair, etc."

This was for a gas company in Cedar Rapids. It is hardly necessary to add that if 6% is sufficient in Cedar Rapids, it might well be used as the test of constitutionality in the most congested and profitable gas territory in the world, in a monopolized industry forever free from competition.

Judge Hough, in the first gas case of this company, Consolidated Gas Co. v. City of N. Y., supra, pages 870, 871, said on the rate of return:

> "Such a business situation is secured against competition, because the monopoly is beneficial. To have the streets of the Borough of Manhattan torn up to afford room (if room exists) for the mains of a rival is unthinkable. For the same reason, and because the population and its wants will increase, so far as human foresight can perceive, the amount of business will also increase. So that the inquiry here is: What is a fair reasonable rate of return upon the most favorably situated gas business in America, not forgetting that all gas business are inherently subject to many of the vicissitudes of manufacturing?
>
> * * * * * * *
>
> "*An interest in the gas business of this city is as nearly a conservative investment as any private manufacturing enterprise can furnish*, and, although each case depends upon its special facts, there is, after probable condi-

> tions are ascertained, one question that can always be asked: What would that prudent man acquainted with business (so familiar to the readers of legal literature) do regarding such an investment, if it were offered to him? We think he would take it, not with enthusiasm but as fairly safe local property, promising a rate of return sufficiently above the local mortgage market, to compensate for the additional and non-insurable hazard. He would expect, and have just and reasonable right to expect, *a return of* 6 *per cent.*, not because that happens to be the interest rate by law established in the State of New York, but because it is the return ordinarily sought and obtained on investments of that degree of safety in the City of New York." (Italics ours.)

The opinion was followed by this Court in Willcox v. Consolidated Gas Co., 212 U. S., 19. This question was squarely determined; under the very favorable circumstances attendant upon this company's business a 6% return was held sufficient. At page 20 the Court said:

> "There is no rule as to any particular rate which any corporation subject to legislative control in the matter has a right to obtain without legislative interference. It depends upon circumstances and locality. In this particular case with reference to the risk attending the business and the locality where it is carried on, the complainant is entitled to a return, if it is possible, of six per cent. upon the fair value of its property actually used in its business of supplying gas."

And again at page 49 speaking of the security of

the investment in a company of this character the Court said:

> "In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum. It is a corporation, which in fact, as the Court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the City of New York would, for the purpose of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply. And, so far as it is given to us to look into the future, it seems as certain as anything of such a nature can be, that the demand for gas will increase, and, at the reduced price, increase to a considerable extent. *An interest in such a business is as near a safe and secure investment as can be imagined with regard to any private manufacturing business,* although it is recognized at the same time that there is a possible element of risk, even in such a business. The Court below regarded it as the most favorably situated gas business in America, and added that all gas business is inherently subject to many of the vicissitudes of manufacturing. Under the circumstances, the Court held that a rate which would permit a return of six per cent. would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investment of that degree of safety in the City of New York.

> "Taking all facts into consideration, we concur with the Court below on this question, and think complainant is entitled to six per cent. on the fair value of its property devoted to the public use." (Italics ours.)

At page 48 the Court in totaling its estimate of rate base and return said:

> "The total value upon that basis of the property employed by the company would be $55,612,435 upon which 6 per cent. would be $3,336,746.10 while the sum estimated as the return on 80 cent gas would have been $3,024,592.14 which is nearly 5½ per cent. on the above total of $55,612,435."

These figures indicate that the Court found that the 80 cent law allowed the company a return of 5.43 per cent. This in the Court's opinion was not confiscatory.

The appellee called two witnesses upon rate of return, Messrs. Allison and Hoyt. Both testified upon the basis of what rate of return would make it attractive to induce investors to put their money into the company. The question in reality is not this, but rather—is the legislative rate so low that it operates to confiscate the property of the company?

Mr. Allison is a "consulting engineer" of St. Louis. He testified that the test of the required rate of return "is that return which would induce new capital to create this enterprise" (Rec., p. 1371). In estimating his rate of return he took into consideration the risks to which the business is subjected. The greatest risk of this company is public regulation! "Public regulation of utilities is now probably the greatest factor of risk in the business" (p. 1373).

Mr. Hoyt, the other witness, is the vice-president of the National City Co. He too based his opinion on what rate of return would attract capital to the business (Rec., p. 1393). Whether or not a rate of return is sufficiently attractive to catch investors as we said previously is not the point at issue. The judicial function is confined to determining at what point a rate becomes so low as to endanger the security of the property and nothing more.

The testimony of these witnesses moreover is so far from the easily ascertainable realities that it was not worthy of credence.

Their theory and solemn testimony is that unless the Consolidated can have a rate which will allow it to pay 8% on the full reproduction value of its property it will not be able to obtain money and its property will be confiscated.

When they testified the only evidence as to reproduction cost was that of the appellee which gives a figure of $216,000,000 as the amount on which the company, according to their theory must have an 8% return. Such a return would mean profits to the company out of gas rates of $17,000,000 per annum or on sales of 24 billions a year a profit per thousand cubic feet sold of 72 cents. With the operating expenses as proved in the case this would mean a rate per M of about $1.60. As a matter of fact the company has been content with a rate of $1.15 for 4 years and with $1.25 for a year before that when prices were much higher than they are now.

Nor, as we pointed out earlier in the brief is the Court below very much nearer actualities when it maintains that the company must have 8 per cent. on a present value of $134,000,000. This would indicate a rate of $1.35 per M and yearly profits of $10,700,000 when as a matter of fact the company has long been content with a rate of $1.15 and in

1921 and 1922, when it fixed its own rates was content with annual average profits of $5,170,000.

Again their witnesses repeatedly referred to the fact that a recent issue of stock of appellee was sold on an 8% basis (Allison, pp. 1388-1390, Hoyt, pp. 1395, 1396. This, however, is far from proving the contention made. The price of one issue of stock at one time, perhaps a most unfavorable time, is no criterion of what the lending public demands. U. S. Steel has sold as low as 50 with few buyers. On a long view Consolidated stock has a low yield.

The stock issue of $30,000,000 which Allison and Hoyt testified to as costing the company 8¼% is now selling in the New York Stock Exchange at about $110 per share, paying 5% thus netting to investors about 4½%. Investors at this moment are apparently content with a return of 4½% on stock in an enterprise which to use the language of this Court (Consolidated case, supra), "is as near a safe and secure investment as can be imagined."

It is interesting to note that when the old case was presented in 1906 the company laid great stress upon the imminent competition of electricity. The hazard of destructive competition was eloquently presented to the Court; prophesies were smoothly made that electricity would in the near future be a "formidable rival, if not a victorious opponent of gas." (Consolidated vs. New York, *supra*, p. 869.) Yet with this danger of a highly competitive rival in the field, both the Circuit Court and this Court held that any return not less than 6% was sufficient. Time, however, has answered this danger of competition. Today, while gas for illuminating purposes has decreased in use and has made way for electricity, on the other hand the consumption of gas for cooking, heating and allied uses has increased tremendously with no sug-

gestion of any rivalry in this field of the industry. The gas business today is secured against serious competition for the future as far as human foresight can foretell. Surely under these circumstances a 6% return is sufficient upon which to test the constitutionality of the present statute.

Attention is called to the action of the Interstate Commerce Commission in fixing the rate of return allowed to the railroads at 5¾%. The Interstate Commerce Commission had allowed a rate of return of 6%, but recently reduced this rate to 5¾%. The Federal Government Commission with its most expert staff of engineers, accountants and public utility experts, both lay and legal, would hardly prescribe a confiscatory rate for the railroads of the entire country. Furthermore under a recent decision of the Supreme Court of the United States, the recapture clause of the Esch—Cummin's Law compelling railroads to return to the Government a share of the net return *above six per cent.* in the valuation of their property was declared valid.

POINT VII.

Every presumption is in favor of the validity of the Statute, and the burden of proof is upon the party assailing such statute to establish its unconstitutionality beyond a reasonable doubt.

The above rule of law is settled beyond dispute by the great weight of judicial authority.

Willcox v. Cons. Gas Cos., 212 U. S., 19;
Sinking Fund Cases, 99 U. S., 700;

The attitude of the Court, confronted with the problem of determining whether an act of the Legislature is confiscatory or compensatory, is entirely different from that of the Public Service Commission in fixing a reasonable rate for a utility to charge.

Judge Hand, in the *Consolidated Gas Case*, 267 Fed. Rep., 231, pointed this out by saying:

> "In the figures I have used I think it clear that everything has been pared down unsparingly, and I take this occasion to say what I have already alluded to more than once already. It would be most unfair to accept any of these figures in fixing a rate. *The attitude of a court is very different; it does not try to do justice between the company and the public, but only to see whether the actual rate can by any possibility, still be a fair rate. In so doing it must take everything in favor of the rate.*"

Judge Hand expresses the correct rule that should guide a court in determining whether a State statute is confiscatory, inasmuch as the company has the power, as well as the incentive, to temporarily increase its expenditures, such as by repairs to plant or other items or by utilizing to a greater extent its more costly manufacturing plants. It may be safely assumed that the company will not conduct its business with the same degree of economy usually practiced, if by so doing it will render doubtful the outcome of this litigation. Human nature is such that once an action is started, one can be reasonably certain that the complainant in that action will not knowingly aid in its own defeat.

POINT VIII.

The Statute should not be declared confiscatory until the appellee has experimented with the statutory rate.

The present law fixing the price at which gas should be sold by The Consolidated Gas Co. went into effect on June 1, 1923, and thus far the appellee has not experimented with the statutory rate.

The first statute (Chapter 125, Laws of 1906) fixing eighty cents per thousand cubic feet as the price for gas for the Consolidated Gas Company and other companies, went into effect on June 1, 1906, and was immediately attacked by the company as confiscatory and unconstitutional, upon the same grounds as urged in the present litigation.

The gas company succeeded in the lower court, but on appeal the case was reversed by the United States Supreme Court (*Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19), principally upon the ground that the proof showing confiscation was not clear or free from doubt and the company was in effect directed to first experiment with the statutory rate.

In its decision the Court points out that the value of the real estate and plant, personal estate and deterioration of plant, mains, etc., were to a considerable extent matters of opinion (p. 42):

> "All these matters make questions of value somewhat uncertain * * *"
>
> "We have a problem as to the character of a rate which is difficult to answer without a practical test from actual operation of the rate."

The Court then lays down the rule respecting the need of experimentation with a given rate in the following language (at p. 42):

> "Of course, there may be cases where the rate is so low, upon any reasonable basis of valuation, that there can be no just doubt as to its confiscatory nature, and in that event there should be no hesitation in so deciding and in enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate. But where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, and the division depends upon opinions as to value, which differ considerably among the witnesses, and also upon the results in the future of operating under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, so far as is possible, the doubt arising from opinions, as opposed to facts."

In the above case, it appeared that the gas company would have earned about five and a half per cent. return upon the value of the property as found by the court below.

The rule that experimentation must first be had where there is any fair doubt as to the confiscatory nature of the given rate, seems well settled by a great number of decisions of our courts.

Knoxville v. Knoxville Water Co., 212 U. S., 1;
Des Moines Gas Co. v. Des Moines, 238 U. S., 153;
Lincoln Gas & Elec. Co. v. City of Lincoln, 250 U. S., 256.

This well established rule is recognized by the New York State Court of Appeals in the case of *Municipal Gas Co.* v. *Public Service Commission,* 225 New York, 89, page 97, where Judge Cardoza, speaking for the Court, said:

> "* * * Through repeated decisions, there runs the consistent thought that, in controversies of this order, *experience is the final test,* that the courts must bide their time and let the workings of the law decide (citing cases). Bills to annul rates have been dismissed 'without prejudice' while the outcome remained uncertain. Bills to annul the same rates have afterwards been sustained when the vision of results was clarified by the wisdom that follows the event."

In a case, however, where operating costs exceed income and no return on capital or actual investment at all is had, it is probable that the effect of the given rate is so certain to result in confiscation that actual experimentation with the rate can be dispensed with. At least, this is the rule adopted by the Federal Court in the case of *Kings County Lighting Co.* v. *Newton, et al.* (268 Fed. Rep., 143). This is not the situation in the instant case.

Judge Hough, in his decision in the above case, pointed this out by saying (p. 147):

> "The point is that the eighty cent rate is confiscatory, not because it does not yield a sufficient percentage on capital, but because

> to produce it at that price consumes capital. Neither the Willcox case nor any other decision can be cited to show that any definite or fixed period of experimentation is a necessary prerequisite to a suit of that kind. *If plaintiff were getting any return at all another question might be presented,* but it is to me a matter of no doubt whatever that a year and a half is a long enough time to experiment with proved capital losses before applying for relief."

Thus the rule of law seems to be that where the proof shows that no return at all on capital expended or investment is had, the case is removed from that realm of doubt and uncertainty, which requires clearer proof of the facts to be gained only through an actual experimentation with the statute; but as Judge Hough points out, in a case where there is any return at all, another question is presented.

There can be but one safe rule to follow and that is to determine whether the return upon the *minimum* valuation determined by adopting any theory approved by our courts, is so clearly inadequate that there is no need for experimentation.

If this view is not taken, one enters at once into that field of doubt and uncertainty caused by the varied and divergent views of expert and opinion evidence as to valuations and into the perplexities and opposing views as expressed by our courts as to the meaning of "fair value."

If it should appear that any return approaching adequacy is had upon the *minimum* valuation of the property of the utility, then this Court must await the time, as Judge Cardoza states,

> "* * * when the vision of results is clarified by the wisdom which follows the event,"

by compelling the company to make an actual experimentation with the statutory rate before its unconstitutionality is pronounced.

POINT IX.

The Statute should not be held unconstitutional because it violates a so-called existent contract between the company and the Public Service Commission.

The appellant contends that the Court and Master erred in holding that certain orders of the Public Service Commission, followed by acceptance thereof, constituted a contract between the Commission and the Consolidated Gas Co., and that the Statute in question impaired the obligation of this alleged contract. Assignment of error was duly made (Assignment of Error No. 51, pp. 344, 345).

The Master's opinion upon this question is as follows (p. 148):

> "Judge Winslow, in passing upon the Special Master's report in the case of the New York & Queens Gas Company v. Prendergast (1 Federal Reporter, 2nd Series, 351), in the District Court, has now upheld this contention of the plaintiff, and, in a well-considered opinion, gives the reasons and authorities therefor. It is not necessary for me to say anything further than that I regard his opinion as being the law of the case on that subject, and am bound to and do follow it."

Judge Winslow in confirming the opinion and report of the Master, said (Rec. pp. 320, 321):

> "I have expressed my views also in those cases (The Queens and Bronx gas cases) as to the contractual obligation resulting from

the rate established by the Public Service Commission for the period of one year and until thereafter modified. I see no reason in the instant case for arriving at a different conclusion. The power of the Legislature to change the rate after the expiration of the 'period of repose', subject to constitutional restriction, is, of course, conceded as elementary."

In the case of *New York & Queens Gas Co.* vs. *Prendergast,* 1 Fed. Rep. (2nd series), p. 371, referred to in the above opinion, Judge Winslow wrote as follows upon this question, at page 375:

"The Public Service Commission fixed the rate and thermal content, to take effect October 1, 1922, and to continue until the 30th day of September, 1923. A certified copy of this order was served upon the plaintiff, and the plaintiff accepted, in writing, the terms and conditions of the order, and in compliance therewith filed and published, as required by law, its tariff schedules, setting forth its rates, etc., and otherwise complied with the terms and conditions of the Public Service Commission's order. This order effected a reduction of rates theretofore in effect.

* * * * * * *

"I am of the opinion that the circumstances disclosed in this case, leading up to the making of the rate to take effect October 1, 1923, and to continue for a year, and its acceptance by the corporation, followed by the expenditure of considerable sums of money, constituted a valid contract for the period mentioned. Mobile Gas Co. v. Patterson (D. C.), 293 Fed. 208, at pages 219, 220. Its repudiation by the Legislature involves the impairment of the contract, which is properly the

subject of judicial review. The court will not presume to comment upon the possible question of business integrity and honor. If the legislative body may deprive the plaintiff of its property without due process, or set at naught its contract, then all constitutional protection is gone for all persons."

The reasoning in the case of Mobile Gas Co. v. Patterson, 293 Fed., 208, upon which Judge Winslow seemingly relied, was recently repudiated by this Court. In the *Mobile* case Judge Clayton held that under the Public Utility Act of Alabama a valuation by the Public Service Commission of the property of a gas company, at its request and its expense, constituted a contract with the state and such valuation should be the permanent basic value of the property in its then condition for all future rate-making purposes.

This Court, in *Patterson* vs. *Mobile,* Sup. Ct. Rep., for May 15, 1926, at page 445, Mr. Justice McReynolds, writing the opinion of this Court, said at pages 446, 447:

"To that portion of this decree which adjudged the rate schedule, prescribed by the commission's order of July 24, 1922, confiscatory, and enjoined any attempt to enforce it, we find no reason to object, and to that extent it is affirmed.

"The remaining portions of the decree must be eliminated. We think they were improvident and go materially beyond what the circumstances require. But whether or not they announce correct conclusions of law we do not decide. The matters to which they relate are left open and subject to further and future original consideration by any proper tribunal. While within his powers as the law then stood,

> the District Judge went very far when he entirely disregarded the views of the Circuit Judges who sat on the specially constituted court. The statute was materially changed by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (Comp. St. Supp. 1925, §1215), and now causes like this must be finally adjudicated by a court composed of three judges. To such a court we think the questions to which those portions of the decree relate ought to go before we undertake finally to pass upon them."

The facts concerning the order of the Public Service Commission (which Judge Winslow construed as a contract) are as follows:

The Public Service Commission, on August 30, 1922, fixed rates to be charged by the company ranging from 1.15 cents per M cubic feet for the first thousand cubic feet for over 1,000,000 cubic feet per meter per month. This order was to take effect on October 1, 1922, and to continue in force until September 30, 1923. The appellee company was to notify the Commission within ten days whether the terms and conditions of the order would be accepted and obeyed. The appellee in a letter, addressed to the Commission notified it that *with certain reservations* this order would be accepted (Rec., p. 2300).

The Commission at the same time made an order fixing a standard of gas to be furnished to its consumers of not less than 537 British Thermal Units on a monthly average. In a similar way the appellee agreed to accepted the provisions of this order. These orders are known as Commission Orders in cases No. 79 and 108.

On June 2, 1923, Chapter 899 of the Laws of

1923, became effective, providing that the rate to be charged by the company should be $1 per M cubic feet of gas furnished and that the British Thermal Unit standard should be 650 B. T. U. The company claimed that this action of the Legislature impaired the obligation of its contract and was in violation of Section 10, Article 1 of the Constitution of the United States. A similar point was raised by the Brooklyn Union Gas Company and the Master, the Hon. Almet R. Latson, ruled against the company upon this point. Judge Campbell also ruled against this contention. (We shall discuss the Master's and Court's decision in this case at later pages.)

It is the settled law that the right to regulate rates and prescribe standards for gas is an exercise of the proper police power of the State. No authorities are necessary on this fundamental question. It is contended that by Section 72 of the Public Service Commission Law it was authorized and empowered by the Legislature to fix rates for a period not exceeding three years; but can it be logically contended that by this provision the Legislature has completely abrogated its inherent police power and imparted it to its own agent without the power of change or supervision? The Commission itself has the right and authority to change or modify rates fixed by it (Sections 22 and 65 P. S. C. Laws) but if the rule set down by the court in the New York & Queens case is followed, the Legislature itself cannot make a change or modification which its agent the Commission is specifically authorized to make. This would operate to give to the creature of the Legislature more and greater power than its creator. The Legislature could remove the individual members of the Public Service Commission or even abolish it completely as a Commission and then create a new Commis-

sion. This new Commission would have the right to fix new rates and standards; if the logic of the opinion in the New York & Queens case is followed, the Legislature itself cannot by acting directly do that which could readily be accomplished through its agent.

If we assume a condition of affairs wherein the price of making gas is suddenly reduced and this might readily happen by a decline in the price of gas oil, the Public Service Commission, if the contract theory is followed, could not lower a rate previously fixed, and no relief could be had from the Legislature because of the alleged violation of the contract obligation provision of the Constitution of the United States. On the other hand, if the price of making gas was suddenly increased, and this might readily happen by an increase in the price of oil also, the utility company could avoid the rate by application to the United States Courts on the ground that the rate previously fixed had become confiscatory. In other words, the rate-making agencies of the State would have been bereft of power to reduce a rate, but the companies would have retained their right to have a rate increased upon a showing that the same was confiscatory at the time of an application to the Federal Court.

It has been repeatedly held and is now settled law that all contracts relative to the public service are entered into in contemplation of the exercise of the reserved right of the State's regulatory power, whenever the public interest may require.

In the case of the Union Drygoods Co. v. Georgia Public Service Corporation, 248 U. S., 372, Mr. Justice Clark said:

> *"Contracts must be understood as made in reference to the possible exercise of the right-*

ful authority of the Government and no obligation of a contract can extend to defeat the legitimate Government authority." (Italics ours.)

In the case of Matter of City of Niagara Falls, v. P. S. Commission, 229 New York, 333, Mr. Justice McLaughlin, in a dissenting opinion, takes occasion to state a few well known principles of law, in the following language:

"* * * It may not be out of place to state a few general principles of law, the correctness of which I do not believe can be successfully challenged. The State, acting through the Legislature, has, by virtue of its police power, the right to regulate the fare to be charged by a street service railroad corporation. This right or power, whichever it may be called, is an attribute of the State sovereignty. It is something which the State cannot sell or give away, either in whole or in part. It is a power which underlies the constitution and is predicated upon the law of necessity. It belongs to the State because it is sovereign, and is a necessity for the existence of the Government. *It is something the State cannot surrender, because to do so would be to surrender a sovereign power. It is as enduring and indestructible as the State itself*" (People v. Adirondack Railway Co., 106 N. Y., 225).

"*All contracts and property rights are held subject to the fair exercise of this power, which embraces, among other things, regulations designed to promote public convenience and general welfare, as well as those in the interest of the public health, morals and safety*" (Chicago & Alton Railroad Co. v.

Tranbarger, 238 U. S., 67; Atlantic Coast Line Railroad Co. v. City of Goldsboro, 232 U. S., 548).

"Contracts cannot be made which in any way impair or limit this power, nor can one legislature limit or control a subsequent one in its exercise" (Buffalo E. S. R. R. Co. v. Buffalo St. R. R. Co., 111 N. Y., 132; Union Drygoods Co. v. Georgia P. S. Corporation, 248 U. S., 372; Manigault v. Spring, 199 U. S., 473; Hite v. C. I. & W. R. R. Co., 284 Illinois, 297; Puget Sd. Traction L. & P. Co. v. Reynolds, *supra;* Chicago Rys. Co. v. City of Chicago, 292 Illinois, 190).

In the case of Chicago & Alton R. R. v. Tranbarger, 238 U. S., 67, Mr. Justice Pitney, speaking for the United States Supreme Court, said (p. 76):

"It is established by repeated decisions of this Court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant; *and that all contract and property rights are held subject to its fair exercise* (Atlantic Coast Line v. Goldboro, 232 U. S., 548, 558 and cases cited). And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals or safety (Lake Shore & Michigan Southern Ry. v. Ohio, 173 U. S., 285, 292; C. B. & Q. Ry. v. Drainage Commissioners, 200 U. S., 561, 592; Bacon v. Walker, 204 U. S., 311, 317)."

In the case of Producers Transportation Co. v. R. R. Comm., 251 U. S., 228, it was said (p. 232):

> "A common carrier cannot by making contracts for future transportation or by mortgaging its property or pledging its income, prevent or postpone the exertion by the State of the power to regulate the carriers' rates and practices. Nor does the contract clause of the Constitution interpose any obstacle to the exertion of that power."

The Supreme Court recently in the case of Bluefield v. P. S. C., 262 U. S., 679, held that the Commission is an instrumentality of the legislature exercising only delegated powers.

> "The validity of the order prescribing the rates was directly challenged on constitutional grounds, and it was held valid by the highest court of the state. The prescribing of rates is a legislative act. The commission is an instrumentality of the state, exercising delegated powers. Its order is of the same force as would be like a enactment by the legislature."

Certainly, if one legislature cannot limit or control a subsequent one in its legitimate exercise of the police power of the State, insofar as contracts are concerned, surely then a public service commission, the creature of the legislature, cannot bind that sovereign power so as to limit or impair its right "to promote public convenience and general welfare."

By the weight of authority, it seems unquestioned that if a contract was entered into by and between the Public Service Commission and the Consolidated Gas Company (the Attorney-General denies that any such contract existed by reason of

the premises) it would be subject to the reserved right of the Legislature to change or modify that so-called contract by the exercise of its police power. The Legislature, even if it so desired, could not divest itself completely of this police power, nor could it delegate it unreservedly or absolutely to any public service commission, nor to any other agency, so as to place beyond its own control this inherent right which it at all times possesses.

In the case of Texas & N. O. R. Co. v. Miller, 221 U. S., 408, the Supreme Court of the United States is direct authority for the foregoing statement. It said:

> "A legislature *cannot bargain away the police power,* nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health and morals of all who may be within their jurisdiction."

We contend that the "acceptance" of the orders of the Public Service Commission by the Company were not of such a character as to complete the necessary elements constituting a contract. "Acceptance" provided for by the Public Service Commission, Section 23, is nothing more or less than a requirement that the utility company affected may indicate whether or not it will accept an order of the Public Service Commission, or will contest it by appropriate judicial proceedings certiorari or otherwise. As Mr. Latson, the Master in the Brooklyn Union case, said:

> "A declaration that the order is accepted cannot give to that order any greater binding force upon the State, than the order itself inherently possesses, whether accepted or protested."

The so-called acceptance as found in the statute is merely a convenient way of informing the Commission whether or not its order will be obeyed or whether the same will be contested by the utility affected.

Special Master Latson in Brooklyn Union v. Prendergast, 7 Fed. (2nd), 628, 637, at page 637 says on this point):

> "With the greatest deference to that learned Court (of the Southern District of New York), may I be permitted to add that the authority there cited, Mobile Gas Co. v. Paterson, 293 Fed. Rep., 208, seems capable of being distinguished from the case at bar. In the instant case we confront the task of ascertaining to what extent, if at all, the State may contract away the exercise of its inherent police power. In the cited authority the State had devised a method by which an issuable allegation of fact (namely, the value of property upon a given day) might be established by contract—by appraisal—by choosing arbiters, in order that the State might thereafter freely exercise these same police powers. That which was there sustained would not in theory or substance be different from a stipulation in the instant case whereby the litigants fixed a valuation of plaintiff's property as of the 1st day of June, 1923, and consented to an adjudication based thereon. In that case the State had extended an invitation to public utilities to permanently resolve such an issue by adopting a prescribed course of procedure, and had nominated the consideration which the utility must pay as a condition of acceptance. It was held that when the utility had accepted the offer of the State and had paid the consideration and a valuation had

been determined, thereupon a contract had been consummated which the State had no power to impair. *The contract there sustained, however, was not a contract establishing a rate but rather a contract establishing the valuation of certain property upon a certain date for future rate making purposes.*"

And again Judge Campbell in confirming the report and opinion of Mr. Latson in Brooklyn Union Gas Co. v. Prendergast, 7 Fed. (2nd), 628, covered this question thoroughly as follows (at p. 660):

"The regulation of rates to be charged by a public utility is an exercise of the police powers of the State (Munn v. Illinois, 94 U. S., 113); and contracts cannot be made which in any way impair or limit this power, nor can one legislature limit or control a subsequent one in its exercise (B. E. S. R. R. Co. v. B. S. R. Co., 111 N. Y., 132; Manigault v. Springs, 199 U. S., 473). Contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government and no obligation of the contract can extend to defeat the legitimate government authority (Union Dry Goods Company v. Georgia Public Service Corporation, 248 U. S., 372).

It has likewise been held that the legislature for the public welfare may modify regulations regarding rates which municipalities may impose in granting licenses or permission to use its streets by public service corporations without impairing the obligation of a contract within the provisions of the Constitution (People ex rel. Village of S. Glens Falls v. P. S. Comm., 225 N. Y., 216).

It has also been held that neither the 'contract clause' nor the 'due process clause' of the Federal Constitution has the effect of overriding the power of the State to establish all the regulations reasonably necessary to secure the health, safety, or general welfare of the community (Atlantic Coast Line v. Goldsboro, 232 U. S., 548).

As thus limited the legislature had authority to empower the Public Service Commission to contract on behalf of the State.

"The authority of the Public Service Commission to contract on behalf of the State must be found in some express grant as such authority will not be implied (Milwaukee Elec. Ry. v. Wisconsin R. R. Comm., 238 U. S., 174; Home Telephone Co. v. Los Angeles, 211 U. S., 265)."

* * * * *

"The Public Service Commission Law must be considered as a whole and from it we find the Commission was empowered to fix the standard of purity from time to time, and to fix the maximum rates by order for a term not exceeding three years, but the Act also empowered the commission to change or abrogate both classes of orders upon a rehearing.

"The Commission could not have greater power than the legislature from which it received its power, and had the rate been fixed by an act of the legislature, it could have been modified or repealed by the same or a succeeding legislature (Village of Saratoga Springs v. Saratoga Gas, etc., Co., 191 N. Y., 123); in which case the situation created by an order fixing the price of gas for a stated period of time was described as a 'period of repose,' and in which a prior statute was under considera-

tion and held unconstitutional on other grounds, but contained the three years provision, Chief Justice Cullen, writing for the Court said, at page 149:

> 'We have no difficulty in upholding the provision that the rate shall remain as established for the term of three years.'

"And at page 150 said:

> 'The learned Court below said that the company would be in no worse condition than if the legislature had itself fixed rates for in such case the rates would be permanent until the statute enacting them had been modified or repealed. This is doubtless true; but statutory rates would operate equally on both parties.'

"The contract, if there be one, must be found in the orders and the acceptance.

"The acceptance is provided for in Section 23 of the Public Service Commission Law, but its sole purpose is to indicate whether the corporation will comply with or contest the order in the courts.

"A contract binding the succeeding legislature cannot arise as the result of the acceptance of the order where the commission was without power to make such a contract. Whatever may be the construction placed upon Section 72 of the Public Service Commission Law, supra, the commission clearly had no power to fix the standard for any definite period of time; therefore, if there was a contract it must be found in the order of the commission fixing the rate, dated August 30, 1922, the parts of which material to this issue read as follows:

> 'That this order shall take effect October 1, 1922, and shall continue in force until September 30, 1923, and thereafter until the Commission shall otherwise order.'

"And the following paragraph:

> 'FURTHER ORDERED that this order shall be without prejudice to the right of any interested party to apply to the Commission for a continuance of the hearings in these proceedings for the purpose of presenting the evidence relating to the subject matter of this order.'

"The plaintiff notified the commission 'that the said order of August 30, 1922, and the terms and conditions thereof are accepted and will be obeyed,' but qualified the acceptance as follows:

> 'This acceptance and statement of readiness to obey the said order dated August 30, 1922, is not intended as a concession by the Brooklyn Union Gas Company that the rates therein prescribed are adequate or reasonable or that such rates and classifications of service will yield a proper return upon the value of the property, used and useful, in its business. Such acceptance and statement of readiness to obey is not intended as a waiver of any right at any time in the future to claim a return upon the value of its property at the time or any other right which it may have with reference to the rates, past, present or future.'

"It thus appears that neither the commission nor the plaintiff agreed without reservation that the rates should continue for a definite

time, but each reserved the right to recede from the provisions of the order.

"In my opinion Mobile Gas Co. v. Patterson, 293 Fed., 208, the authority cited in New York and Queens Gas Co. v. Prendergast, supra, seems to me to be clearly distinguishable. In that case the State of Alabama had provided that the value of the property of a public utility corporation should, on its application and payment of expenses, be determined by the Alabama Public Service Commission, and that the value so fixed should constitute the permanent basic valuation of the property as of the date of the valuation for all future rate making purposes.

"By that method a fact, the value of the property as of a certain date, was established for future rate making purposes, and the Court held that by the acceptance of the State's offer by the public utility corporation, and the payment by it of the expenses, a contract had been consummated.

"By the contract there sustained, no attempt was made to fix a rate or to contract away the exercise of the police power of the State, while in the case at bar plaintiff seeks to establish a contract which would fix a rate and prevent the State from exercising its police power for the term of one year from October 1, 1922.

"I therefore hold that the statute in question does not violate Section 10 of Article 1 of the Constitution."

The learned Judge was, we contend, sound and the view he states should be adopted.

POINT X.

The price and standard provisions of Chapter 899 of the Laws of 1923 are so independent of each other that this Court should declare them severable. Both standard and rate should be declared constitutional but if either is declared unconstitutional the other remains.

The act under review is entitled "Charge for gas in cities of one million or more." It will be noted that the title of the Act considers only the charge provision. The Act itself in Section 1 amends Chapter 48 of the Laws of 1910 by adding a new Section, 67A, to read as follows:

> "A gas corporation engaged in the business of manufacturing, furnishing or selling illuminating gas in a city, containing a population of one million or over, shall not charge or receive for gas furnished or sold in such city a sum per one thousand cubic feet in excess of one dollar, nor furnish in such city gas of a standard less than six hundred and fifty British Thermal Units per cubic foot, measured under normal conditions of temperature and atmospheric pressure. The Public Service Commission, notwithstanding any other provision of this chapter, shall not allow a rate or charge in the case of such cities in excess of such sum."

Section 2 provides "This act shall take effect immediately.

The facts underlying the statute are briefly as follows:

At the time of the passage of this Act, the Public Service Commission had fixed a rate for the plantiff company of $1.15 per M cubic feet for gas generally in retail quantities and rates from $1.15

to 95 cents per M cubic feet for gas supplied in larger quantities. At the same time the Commission had fixed the calorific heat contents of the gas to be furnished as not less than 537 British Thermal units (Exs. 211, 212, 214, 216, 217, 254; pp. 2189, 2217, 2299, 2300, 2302, 2303).

This standard took the place of the former standard which required that the gas have an illuminating power equivalent to 22 candle power. Such gas had a heat content of from 620 to 650 British Thermal Units per cubic foot (p. 897).

The Act in question purposed to affect the reduction of the rate to a flat $1.00 rate per M cubic feet, and by a second provision fixes a calorific standard of 650 British Thermal Units.

The real facts underlying the situation are as follows:

Gas is burned in modern appliances on the Bunsen burner principle, and the gas as manufactured is mixed with air so that at the burner the British Thermal Units are 200 per foot (p. 1138). The lower the number of British Thermal Units in the gas manufactured, the smaller the amount of air may be admitted with the gas to insure the requisite number of British Thermal Units at the burner, and *vice versa*, the larger the B. T. U. content, the more air must be introduced.

It appears to be good practice to adjust appliances so that they will get the right amount of air mixed with the gas. At considerable expense this was done by the Company after October 1st, 1922. The heat content being lower, the air shutter was closed on some appliances and the gas orifice opened on others (p. 894) so that gas could be burned that ranged from 610 B. T. U. to 545 B. T. U. (pp. 896, 915). The standard of gas was then reduced to about 585 B. T. U. (p. 1138), where it stood when Chap. 899 of the Laws of 1923 was enacted, and where it still stands.

To make gas of 585 B. U. T. takes only 3.04 gallons of oil per M cubic feet (p. 1128). The saving to the company in operating cost is approximately 5 cents per M over the estimate of cost of making such gas that each consumer will obtain the statutory standard of 650 B. T. U. (Master's Finding No. 110, p. 184). If the standard were still further reduced to 537 B. T. U., all that is required by the Public Service Commission order, the saving would be still greater. The amount does not appear in this case, but in the Brooklyn Union case it is estimated to be an additional 3.64 cents per M.

It seems to be the consensus of opinion of the experts on both sides of the case that to give every consumer, even the most distant, gas of 650 B. T. U's., would not give the consumers better service but rather worse because of the great variations (Little, p. 1884; Woods, p. 1135; Rasch, p. 913).

It would make considerable difference to the company to lower the standard, for the lower the standard the cheaper it is to make gas and, given the same price, the greater the profit.

This explains the attitude of the appellee as to the standard provision of the statute. It was so vital for profits sake that the standard should never again be increased that the greatest industry and the most imposing array of witnesses were brought to bear to prove that the particular standard fixed was impossible, dangerous, unwise, unnecessary and otherwise beyond the domain of reason (Rasch, pp. 891-896; Woods, pp. 1134, 1135, 1143).

At the same time the company has vehemently protested and the Court has held that this same standard must be considered a part of the statute and the additional 5 cents to produce such gas must

be considered part of the operating expenses and assist in declaring the statute unconstitutional.

This attitude seems quite illogical. If the standard is impossible of performance it could hardly increase operating expenses.

The standard, we earnestly contend was not proven unconstitutional but at most, in the opinion of the experts, unwise and uneconomical. The testimony does not deny that it was and is "possible" to furnish gas of the statutory standard (Woods, pp. 1139, 1200, 1239; see also Little, p. 1884) . The danger, impossibility and other disabilities under which the standard staggers, would follow only if gas of the standard prescribed were furnished before consumers' appliances were adjusted (pp. 896, 1134, 912).

That the courts will not avoid a statute merely because it does not meet the views of experts or of the Court as to its wisdom is well settled.

In Hunter v. Pittsburgh, 207 U. S., 161, at p. 176, the Court said:

> "We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration; these questions are for the consideration of those to whom the State has entrusted its legislative power."

The only other basis for considering it unconstitutional lies in the fact that the statute is declared by its terms to take effect immediately and it is the weight of the testimony that before furnishing such a high standard of gas it would be necessary to readjust the appliances of consumers in order to obviate any dangers from incomplete combustion (Rasch, p. 894; Woods, p. 1135).

This, however, would not in and of itself render the statute unconstitutional. The company would have a right to apply for an injunction against the

statute until such time as compliance with it would be safe.

Wadley Southern Ry. Co. v. Georgia, 235 U. S., 651.

Moreover the word "immediately" in the enacting portion of a statute is usually construed liberally to mean at the earliest practicable date.

Words & Phrases, Vol. 4, pp. 3403-3409.
Penn vs. State, 41 N. E. 937, 142 Ind. 428.

In Fidelity vs. Courtney, 103 Fed., 602, the Circuit Court of Appeals in Kentucky, held that the term "immediately" should be construed as meaning as "soon as reasonably practicable" and quotes with approval the definition of immediate in Business Law Dict., "as usually employed it is rather within reasonable time, having due regard to the nature and circumstances of the case."

The Special Master in this case held this view in the case of New York & Queens Gas Company v. Prendergast, 1 Fed., 2nd 351, and yielded his view in this case only because the District Court disagreed with him.

In the New York & Queens case he said:

> "Whatever differences of opinion may exist as to the desirability of this standard, it seems to me that the Legislature has the power to prescribe a B. T. U. standard of gas to be furnished and make it applicable only to the City of New York. It did this previously in the case of the 22 candle power standard. The latter provision existed unquestioned for many years, and even when the rate prescribed in the same section was held unconstitutional, no such claim or decision was made in regard to the candle power standard. I think this con-

struction, long acquiesced in, is of weight in the determination of this question" (Rumsey v. People, 19 New York, 41).

"I doubt very much whether the provision that it should take effect immediately would be enforceable in view of the indefiniteness of the test prescribed and the serious effect on life and proprty so to do without an opportunity being given to change the appliances and test the act, but I do not think the failure at all times to deliver to every consumer, wherever situated, gas of this quality would be regarded any more seriously than the Court regarded the failure to deliver at all times 22 candle power gas. Nor do I believe that the fact that the Act took effect immediately on the signing thereof by the Governor, while it would require some eight or nine months to make the necessary adjustments to such standard, would impose any greater liability on the company than the order of the Public Service Commission, which took effect October 1, 1922, and was not fully complied with for some months afterwards, for I believe its enforcement would and should be enjoined until the company had an opportunity to test the Act, and after that to change the appliances.

"The plaintiff was entitled to a preliminary injunction, and secured it, restraining the enforcement of the standard provision of the statute pending the outcome of this litigation and is now entitled to a continuance of the injunction pending reasonable opportunity and a period of time for making such preparations as are deemed necessary in order substantially to comply with the requirements of the statute.

"My conclusion is that while the standard provision of the statute must be sustained as

> ultimately constitutional, its immediate enforcement was properly enjoined as violative of the plaintiff's constitutional guaranties."

We believe that the Master was sound in his view on this important subject and that the standard provision should have been declared constitutional.

But it does not follow, as he holds throughout his report that there should be added 5 cents or indeed any amount to operating costs if the standard is sustained.

The prime basis, both for much of the testimony as to the unconstitutionality of the standard provision as well as for the estimate of excess cost was of a peculiarly strained construction of the phraseology.

The statute provides that no company shall charge more than $1.00 per thousand cubic feet sold

> "nor furnish in such city gas of a standard less than 650 British Thermal Units per cubic foot, unearned under normal conditions of temperature and atmospheric pressure."

It was the assumption of the experts on both sides that the word "furnish" meant to furnish to each and every consumer (Woods, pp. 1200, 1206; Little, pp. 1884-1885). Much of the testimony as to the variability of the standard was based on this assumption. It is conceded that from the plant to outlying sections of the territory served the gas will lose a percentage of its hydro carbons which give it both heating and lighting value (p. 1115). It was therefore the testimony that in order to give the most distant consumer gas of a 650 B. T. U. standard it would be necessary to make gas of as high a standard as 700 B. T. U's. and in that case those consumers near the plant would receive gas of a higher standard than that required (pp. 1130 and 1210).

The question all turns upon the construction of the word "furnish." If it means "furnish each consumer" it will be "possible" (Woods, p. 913), but the cost will be greater as will the variability of the gas.

It is earnestly contended that the Court and experts on both sides placed a strained construction on this word.

It is well settled that the courts in construing a statute will make every effort to make it a practicable and constitutional enactment. This Court has frequently announced this rule of construction. Recently in the case of Linder vs. U. S., 268 U. S., 17, this Court said:

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

See also,

Lewelyn v. Frick, 268 U. S., 251.

There have long existed in the City of New York stations whose sole function is to test the gas manufactured in the city. These stations were established pursuant to the provisions of Chapter 735 of the Laws of 1905 which provides for daily tests of gas to "illuminating power, pressure and purity." Furthermore the Public Service Commission has the general power of inspecting gas and under its order of October 1, 1922 (Ex. p. 51), provided for its tests at the plants of company.

It may be presumed that the Legislature had in mind the provision already made for testing gas and that when it did not specify where the tests were to be made assumed that they would be make either at the company plants or at the city testing stations which are approximately one mile from the works. The best proof that this the proper construction to be placed on the word "furnish" in

the statute is found in the fact that both Mr. Woods and Mr. Little at firsh blush so construed the statute (Woods, p. 1200; Little, p. 1885).

The fair assumption is not the assumption made by the witnesses but that the Legislature intended that the gas should be of a standard of 650 B. T. U's. tested at the places provided for such tests. It is indeed quite unreasonable to assume that the Legisture intended that the complicated apparatus for testing gas should be taken around the district and the gas tested at the residences of the most distant consumers.

Under this reasonable construction of the statute the cost to produce gas of the statutory standard would be much less than 5 cents in excess of that actually made. The record does not show how much less. Probably three cents per M would be a fair estimate.

Even this amount, however, it would be unnecessary to add to production costs. Appellee has never made the gas required and concededly is entitled to refrain from making it for at least nine months after the decree in this case is finally entered. Whether it would have to make it even then is problematical and even unlikely.

Under the statute here involved and above quoted it is noteworthy that the title refers only to "charge" for gas. Moreover the enactment itself limits the power of the Public Service Commission only as to increasing the rate to be charged. There is no limitation on its continued power to vary the standard. This power is granted to it under Article 4, Section 66 of the Public Service Commission Law which provides:

> "General Powers of Commission in Respect to Gas and Electricity.
>
> "3. Have power by order to fix and change from time to time standard of the purity, il-

> luminating power and heating power, * * * of gas to be manufactured, distributed or sold by persons, corporations or municipalities for lighting, heating or power purposes, notwithstanding that other standards of the purity, illuminating power and heating power of gas * * * may have been fixed by general or special statute. * * *"

Nothing in the statute under review specifically repeals the foregoing provisions. The most that can be said is that they have been repealed by implication, but repeal by implication is not favored in the law. Courts from time immemorial have held that every available effort will be made to reconcile various provisions of the statutes so as to avoid their repeal by implication.

It is certain that in the event the standard is sustained the first move of the appellee would be to ask the Public Service Commission to reduce the standard and it is entirely probable that that body, long before the expiration of the injunction would not only reduce the standard to its present status but down to the standard fixed by its order of October 1, 1922. (Its opinion as to the proper standard is carefully set out in its memorandum accompanying that order [Plt.'s Ex. 212, pp. 2217-2298]).

When the situation is so problematical there is no justification for increasing the production cost in testing the rate.

Even though the standard should be adjudged unconstitutional the rate would still stand.

It is the well settled principle of law that where a statute can be separated and where it appears that one provision can be upheld, although another

provision is null and void, the courts will strike out the unconstitutional portion and use every effort to uphold the portion which is unobjectionable. Where the objectionable portion of a statute is distinct and complete in itself as in this case the standard provision, the courts have stricken out the invalid portion and permitted the rest of the statute to remain.

In the case of Packet v. Keokuk, 95 U. S., 80, the Court passing upon an ordinance of the City Council of Keokuk, Iowa, held that statutes which are constitutional in part only will be upheld and enforced so far as they are not in conflict with the Constitution. At page 89 the Court said:

> "Statutes that are constitutional in part only, will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case. It may be conceded the ordinance is too broad, and that some of its provisions are unwarranted. When those provisions are attempted to be enforced, a different question may be presented."

To the same effect are the case of People v. Kinney, 96 N. Y., 294; Curtain v. Barton, 139 N. Y., 505.

It is only where the provisions of the whole Act are so interdependent as to show conclusively that the Legislature would not have enacted the valid portion alone, that the entire statute would be adjudged invalid.

In the case of Pollock v. Farmers Loan & Trust Co., 158 U. S., 601, the Court in passing upon the constitutionality of the provisions of the Tariff Act of 1894, purporting to impose a tax upon incomes, in an opinion by Mr. Justice Fuller, said:

> "It is elementary that the same statute may be in part constitutional and in part unconstitutional and if the parts are wholly independent of each other that which is constitutional may stand while that which is unconstitutional will be rejected."

Likewise in the case of Poindexter v. Greenhow, 114 U. S., 270, page 304, the Court said:

> "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional and another be declared inoperative and void because unconstitutional."

Recently this Court held in Weller v. New York, 268 U. S., 319, that the provision of a statute of New York relating to the resale of theatre tickets and licensing of ticket agencies were severable. The Court held that if the resale provision were eliminated, the license provision would still present a workable plan, citing Dorchy v. Kansas, 264 U. S., 286, as authority. Similarly if the standard provision of the statute in question were eliminated a workable plan would still remain, particularly in view of the fact that the Legislature specifically reserved to the Public Service Commission the power to fix or change the standard of gas to be furnished.

The conclusive case on this point, however, is Willcox v. Consolidated (supra), where the same contentions were made as to pressure as are here made as to standard. There the Court said:

> "The acts provided that the pressure of the gas in the service mains at a distance from the place of manufacture shall not be less than one inch nor more than two and a half inches.
>
> "The evidence shows that to put a pressure

such as is demanded by the acts upon the mains and other service pipes in their present condition would be to run a great risk of explosion, and consequent disaster. Before compliance with this provision would be safe the mains and other pipes would have to be strengthened throughout their whole extent, and at an expenditure of many millions of dollars, from which no return could be obtained at the rates provided in the acts. This would take from the complainant the ability to secure the return to which it is entitled upon its property, used for supplying gas, and the provision as to the amount of pressure is therefore void. This particular duty imposed by the acts is, however, clearly separable from the enactments as to rates, and we have no doubt that the remainder of the statute would have been enacted, even with that provision omitted.

"The obligation would remain upon the company to have a pressure sufficient to insure a light of 22 candle power, as provided in the acts. * * *

"When the objectionable part of a statute is eliminated, if the balance is valid and capable of being carried out, and if the Court can conclude it would have been enacted if that portion which is illegal is omitted, the remainder of the statute thus treated is good."

The situation is exactly similar here. With no standard fixed the "obligation would remain upon the company to furnish" gas of a reasonable adequate standard and the Public Service Commission would be and is empowered to prescribe the exact standard required.

POINT XI.

The Court below has made an exaggerated estimate of the cost to reproduce appellee's property, in the following particulars: (1) The land of appellee, (2) the street mains and services.

(1) THE LAND OF THE APPELLEE. The Special Master, in arriving at his value for land, followed a very simple and easy course. There were four witnesses called on the value of land —two on behalf of the appellant and two on behalf of the appellee. All were competent real estate experts. (See as to witness Stevens, pp. 577-580; as to witness Huntley, pp. 706-712; as to witness McHale, pp. 1698-1702; as to witness Boylan, pp. 1732-1736.) The first two witnesses are those of appellee and the last two witnesses mentioned are those of appellant. The dean of them all is Martin McHale, who has been in the real estate business for 34 years. He was one of the appraisers called in the case brought by this Company in 1906, and, as his statement of qualifications shows, he has had a remarkably broad experience. He was attacked viciously by counsel for the appellant on the ground that he had once appraised land for a man by the name of Mandell, whose bank afterwards closed (see pp. 1706, 1707, 1755, 1758). The attack, however, was not a serious one, and all that clearly appears is that McHale made an appraisal for Mandell which was higher than the property appraised afterwards sold for and that Mr. Mandell used this appraisal to obtain a license from the State Banking Commission, but without McHale's knowledge. On the whole, the four witnesses were none of them impeached, and their testimony stands. Although it was necessary to print their testimony in order to raise the question of the value of real estate, we shall not ask the Court to examine each parcel and the testimony thereon, of

each of the four witnesses. The testimony of the four witnesses may be summed up in the table attached hereto:

SUMMARY OF APPRAISALS

Land Owned, Used and Useful in the Plaintiff's Gas Business as of June 1, 1923[1]

Block	Lot No.	Huntley Appraisal	[2]Stevens Appraisal	Assessed Value 1924	McHale Appraisal	Boylan Appraisal	Master's Allowance
239	1, 5	$ 181,500	$ 175,000	$ 145,000	$ 148,500	$ 160,135	$ 175,000
368	1	487,000	465,000	375,000	435,650	451,269	465,000
369	1, 10, 11, 12, 13, 14, 15	757,000	671,000	408,000	[3]566,457	[3]573,409	650,000
382	22	345,000	357,000	300,000	302,449	314,382	351,875
989	1	227,000	210,000	169,000	184,002	192,183	210,000
982	13	437,500	[2]437,500	342,000	321,371	333,818	437,500
988	1	680,000	[2]680,000	415,000	464,860	485,350	680,000
991	1	361,755	[2]361,755	180,000	263,961	274,170)	
991	47	67,800	[2] 67,800	67,000	45,220	45,220)	429,555
870	60, 47	522,500	510,000	431,000	425,480	447,700	510,000
985	7, 19, 20	229,000	216,000	216,000	228,800	197,340	216,000
951	35	62,000	65,000	53,000	53,434	53,434	65,000
952	7, 29, 30, 35	372,000	396,000	370,500	358,041	346,318	370,000
953	1	565,000	552,000	550,000	461,340	480,833	552,000
978	5, 6	475,000	491,000	460,000	418,148	420,628	475,000
979	1, 27	582,000	571,000	484,000	523,461	523,543	571,000
987	37	176,000	133,000	105,000	130,880	130,880	133,000
1090	23	132,000	135,000	100,000	118,800	119,299	135,000
1089)	1)						
1107)	7)	2,000,000	[2]2,000,000	1,550,000	[4]1,289,725	[4]1,276,456	2,000,000
1092	16	289,000	302,000	305,000	290,115	290,115	302,000
1093	9	398,000	351,000	315,000	345,642	346,363	351,000
1028	38	660,000	660,000	530,000	531,520	531,520	660,000
1457	6	180,000	179,000	145,000	170,118	170,746	179,000

1157	1	1,076,000	1,057,000	950,000	858,880	878,658	1,057,000
1177	21	398,000	440,000	320,000	337,168	345,292	440,000
1670	1	567,000	464,000	542,500	386,100	386,100	464,000
1692	1	285,000	260,000	240,000	222,225	216,425	260,000
1682	11, 8	369,000	368,000	422,500	330,000	330,000	368,000
1683	18	88,000	83,000	80,000	77,000	77,961	83,000
1704	5	368,000	362,500	355,000	329,333	332,571	362,500
1712	2	87,000	78,250	52,500	72,006	73,560	78,250
1642	33	53,000	46,500	52,000	48,400	48,400	46,500
1998	50, 53, 54, 55, 56	77,000	80,000	50,000	61,600	60,704	80,000
1999	1	240,000	227,000	165,000	200,200	197,815	227,000
2108	23	22,000	21,000	21,000	19,800	19,800	21,000
2497	132	200,000	200,000	70,000	200,640	200,640	200,000
3236	1	265,000	250,000	200,000	199,500	199,500	170,000
Total		$14,282,055	$13,923,305	$11,536,000	$11,420,826	$11,532,537	$13,775,180
Less portion rented to Block 870, Lots 47, 60 (General Office Property, 61.8%		322,905	315,180	266,358	262,946	276,678	315,180
Land owned, used in the gas business, as of June 1, 1923		$13,959,150	$13,608,125	$11,269,642	$11,157,820	$11,255,857	$13,460,000

[1] Land acquired subsequently to June 1, 1923, does not appear as testified to by Mr. Huntley or Mr. Stevens.

[2] Mr. Stevens did not testify as to the parcels comprised within the 14th and 42nd Street plants; therefore Mr. Huntley's figures are shown for those parcels, as indicated for a comparative total.

[3] These figures do not include the valuation of the bed of alleged Tompkins Street, valued by Mr. McHale at $398,030 and by Mr. Boylan at $411,108.

[4] This figure does not include the valuation of the bed of projected Twelfth Avenue, separately valued by Mr. McHale and by Mr. Boylan.

THE ASTORIA LIGHT, HEAT AND POWER COMPANY

Block	Lot No.	Huntley Appraisal	Stevens Appraisal	Assessed Value 1924	McHale Appraisal	Boylan Appraisal	Master's Allowance
849	1	$ 34,000	$ 24,000	$ 25,000	$ 23,680	$ 23,680	
850	1	4,700,000	4,000,000	3,000,000	3,752,040	3,752,040	
859	1	53,000	36,400	44,000	32,000	32,000	
860	1	50,000)	34,300)	44,000)			
870	1	50,000)	34,300)	42,000)	73,600	73,600	
871	1	54,000	36,400	42,500	32,000	32,000	
881	1	54,000	36,400	44,500	32,000	32,000	
882	1	84,000	37,300	45,000	48,000	48,000	
893	1	80,000)	50,000)	51,800)			
894	1	108,000)	85,000)	91,000)	180,000	180,000	
895	1	24,000)	32,000)	42,500)			
Total		$ 5,291,000	$ 4,406,100	$ 3,472,300	$ 4,173,320	$ 4,173,320	$ 4,350,000

It will be noted from the above comparison that no attention whatsoever has been paid to the values testified to by the experts for appellant. The figures found are in each instance either exactly the figure testified to by one of the experts of appellee, or, in a few cases, a value between the two figures given. In some instances the differences are quite substantial, as, for instance, Lot No. 1, Block 988, on the 14th Street Station. As to this plot, witness Huntley for the appellee was the only person who testified on that side. His figure for this parcel was $680,000. The assessed value of the land was only $415,000. Witness McHale testified to a value of $464,000, and witness Boylan to a value of $485,000. The Master entirely disregarded the assessed valuation and the testimony of the two witnesses for the appellant, and found exactly the value testified to by witness Huntley of $680,000 (p. 185). The same applies to the other parcels included in the 14th Street plot, and, in some cases though to a lesser extent, to all of the findings of the Master. The method used by the Master indicates that he decided the value of the land not by a study of the testimony of the various witnesses but by some rule of thumb, which included as its first element disregarding the testimony of the witnesses for the appellant. In this we earnestly contend that the Master was in error.

(2) MAINS AND SERVICES: The testimony produced by the appellee as to the cost to reproduce mains and services is so exaggerated as not to command the belief even of the Master. Mr. Simpson, called to testify as to the reproduction value of these two items of the Company's property, put a valuation on mains of $37,075,232.97 (p. 2314, fol. 3397), and on services $5,557,284.35 (p. 315, fol. 3308). The Master said as to this appraisal (pp. 114-115):

"The street mains Mr. Simpson appraised at the sum of $37,075,233, and the services at $5,-557,284. The former had cost the plaintiff $13,531,095.10, and the latter $1,971,101.26. It will be observed therefore that Mr. Simpson's appraisal gives a June 1, 1923, reproduction cost of mains of nearly three times the company's investment therein, and of the services of about two and one-half times. It is true, undoubtedly, that to reproduce the mains and services under conditions as they exist today in the Borough of Manhattan would cost a very considerable amount in excess of the cost of their original installation, but that it would be so great an increase as above stated, does not accord with my opinion of the general increases of costs of labor and material, nor with my judgment on the facts in relation thereto as presented in the testimony. While the generally accepted increase over prewar prices of labor and materials is some 60 per cent, it is true that in the case of mains particularly the great increase of underground structures in the Borough of Manhattan in the last fifteen or twenty years has added considerably to the cost of installation. It seems to me, however, that if we accord substantially 100 per cent increase over the original cost these difficulties as well as the increased cost of labor and material are taken into consideration. I have great respect for Mr. Simpson's knowledge and the detail with which he has worked out his estimates, but after all it is an estimate based on what he calls average conditions encountered in the Borough of Manhattan, and it seems to me that he has overestimated the cost of meeting such conditions or has taken a condition as an aver-

age one which is more costly than what the cost would be based on the actual construction of the mains themselves. For the same reasons substantially I have reduced the estimate as to the replacement cost of the services."

The amounts found by him were, respectively, $27,450,000 (p. 186), and $4,350,000 (p. 186).

What the Master has in effect done is entirely to disregard Mr. Simpson's testimony and make his own deduction as to the probable cost to reproduce this portion of the property of appellee. He could hardly avoid disregarding Mr. Simpson's testimony, so disregardful was it of all probabilities and possibilities.

Mr. Simpson made no adequate analysis of costs, or of the time which would be consumed in the gigantic work of laying 1,000 miles of mains in the City of New York. Typical examples of his figures are as follows:

Although the caulking and yarning of mains, now and for some years laid by the appellee is and has been done by skilled workmen who get $5.60 or less per day (p. 494), Mr. Simpson made up his calculation on the basis of paying caulkers $8.00 per day (pp. 494-497). Although the company uses pneumatic hammers to some extent in caulking mains, Mr. Simpson planned to have the 1,000 miles of main all caulked by hand (pp. 495 to 500). Also, he figured on using hand work for excavation throughout (pp. 500-501). Although the testimony showed that there was a large amount of duplication in mains, due to the consolidation of various companies into the Consolidated Gas Company, Mr. Simpson expected to re-lay every distinct main as it now exists (p. 502), even though in one block there were five distinct

mains of the Consolidated system (p. 502), and on other streets there were as many (pp. 503-507). He expected to lay 1½-inch main where it still existed, although such small mains have not been laid in New York for many years (pp. 511, 512-526). He expected to tamp all of the back fill by hand, although machines have been perfected for this purpose (p. 515).

The method in which he got the price for the 180,000 tons of main required is interestingly told. He testified that he talked with Mr. Stokes one day, saying to him, "Say, Mr. Stokes, while we are talking about this, suppose I had 180,000 tons to order —how would you like an order like that?" To this Mr. Stokes answered, "We will take it. I do not know what we will do to you on the price. It will be a mighty nice order and of course we are out to get the business" (p. 521).

Mr. Simpson was "joking" with Mr. Stokes in regard to the "rate proposition", and a reading of his testimony indicates that he was still joking when he took the stand.

Other instances of the incredible character of Mr. Simpson's testimony could be produced *ad libitum,* but we will not presume further on the Court's patience with such details. The Master has disregarded this testimony, and justly so. There is one particular, howewver, in which the Master and the Court below have gone astray in relying upon Mr. Simpson. Mr. Simpson testified that his appraisal was based upon the average sub-surface conditions throughout the Boroughs of Manhattan and the Bronx, where Consolidated mains are laid (pp. 453-470). At the latter page he testified as follows:

> "Conditions so far as sub-surface structures are concerned are not the same in all parts of Manhattan. Some parts of Manhattan Island

are more crowded with sub-surface structures than others. The avenues contain more sub-surface structures than the ordinary side streets and the streets in the lower part of Manhattan are more crowded than they are in the extreme upper part. You have plenty of sub-surface structures; all that the streets can accommodate in most parts of Manhattan. Anything from 59th Street down would be described as the lower part of Manhattan; take it as half of Manhattan Island. From 110th Street down, extending clear across the width of the Island, the sub-surface structures are very numerous, extending clear across the width of the Island. That condition obtains all the way south from 110th Street to the lower tip of Manhattan Island, growing progressively worse as you get downtown."

And again at page 473:

"That territory where rock is encountered would be the most expensive, insofar as excavation is concerned, but there might be extra excavation work required at points south of that, due to sub-surface structures, that would far exceed the cost of excavating rock. The most expensive section to lay mains would be almost anywhere south of 59th Street. Certainly the worst possible spot you could pick out would be any avenue south of 23rd Street, but the presence of those sub-surface structures may make it impossible to lay the main, unless you move them all. In other words, you may come to a condition where you have three or four duct banks lying one above the other, and the only possibility is to make a place between them and put the main through. Now, of course, in this appraisal I have not

figured that, for the reason that the main is there, but you are asking about present time construction, and that would be the case. In taking these two duct lines out, you might have to go back a block and pull cable. The worst place in the City if you were to take one spot representing the maximum figure which I would use for laying mains, would be William and Wall Streets. A section where considerable work might have to be done, and which would represent a condition which would exist for some considerable distance, is Third Avenue from practically one end to the other."

The Master followed him in this portion of his Opinion quoted above, saying (p. 114):

"While the generally accepted increase over pre-war prices of labor and materials is some 60 per cent it is true that in the case of mains particularly the great increase of underground structures in the Borough of Manhattan in the last fifteen or twenty years has added considerably to the cost of installation.

"It seems to me, however, that if we accord substantially 100 per cent increase over the original cost these difficulties as well as the increased cost of labor and material are taken into consideration."

The Master, therefore, and the Court below have arrived at their estimate of the reproduction cost of laying the mains of the plaintiff company by applying 60 per cent increase for increase in the cost of labor and materials, and, in addition, 40 per cent for the increase in the underground structures which would be encountered at the present time. In both increases the Master quite appar-

ently is in error. To apply the 60 per cent increase to all of the mains, whenever laid, is of course erroneous.

A more serious error consists, however, in the fact that the Court below added such an enormous percentage over cost for the increase in underground structures in the Borough of Manhattan. Quite an analogous situation was decided adversely to appellee's claim in the Court's decision in the Des Moines Gas Company against Des Moines, 238 U. S., 153. There the Court said in regard to pavements over mains (at pp. 172-173):

> "As to the item of $140,000, which, it is contended, should be added to the valuation because of the fact that the Master valued the property on the basis of the cost of reproduction new, less depreciation, and it would be necessary in such reproduction to take up and replace pavements on streets which were unpaved when the gas mains were laid, in order to replace the mains, we are of opinion that the Court below correctly disposed of this question. These pavements were already in place. It may be conceded that they would require removal at the time when it became necessary to reproduce the plant in this respect. The Master reached the conclusion that the life of the mains would not be enhanced by the necessity of removing the pavements and that the company had no right or property in the pavements thus dealt with and that there was neither justice nor equity in requiring the people, who have been at the expense of paving the streets, to pay an additional sum for gas because the plant when put in would have to be at the expense of taking up and replacing the pavements in building the same. He held that such added value was wholly

theoretical when no benefit was derived therefrom. We find no error in the disposition of the question."

The situation here is entirely parallel to that of the pavements over mains. Sub-surface structures in New York, such as sewers and subways, are most of them constructed at public expense. Other sub-surface structures, such as electric light wires, telephone wires, telegraph wires, etc., are constructed at private expense but are supported out of the rates paid by the public.

Certainly, as in the case of pavements over mains, the life of the mains would not be enhanced in any way because of the extra expense involved in laying the mains, because the sub-surface structures exist, and there can be no question that the added value of 40 per cent attributable to this cause is "wholly theoretical," since "no benefit is derived therefrom," and the Court below was in error in making such an addition in its valuation. This error alone accounts for over $5,000,000 of the $27,000,000 allowed by the Court below for mains.

POINT XII.

The decision of the Court below should be reversed and the case remanded with instructions to enter a decree dismissing the complaint.

Respectfully submitted,

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Solicitor for Appellant Ottinger.

WILLIAM HAYWARD,
CHARLES E. BUCHNER,
of Counsel.

357. Ottumqua v Con. Gas Co.-

358. " v Brooklyn Union Gas

365 " Kings County Lighting Co

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1907- Con Gas Co. v City of Ny. 157 Fed. 849-
Hough D. J.

1. Actual or reproduction value is the measure without regard to original Cost.

2. Real estate not used should be excluded unless needed in the near future.

3- Title defective immaterial.

4 Working Capital

~~75 Cent~~ 80 Cents Rate held Confiscatory.

=

1909- Willcox v Con Gas Co. 212 U.S. 19- Reversed the above.
The rule of present value is established

Where Confiscation not clearly shown and Rates are have not been tested by experience - Dunn.

Over-

1920 - Con Gas Co v Newton 267 F. 231 -
Learned Hand. D. J —

1. Length of Test period
2. Enhanced value taken
3. Depreciation not a factor in computing rate base where reproduction cost is adopted in valuation. But at existing cost of renewals over the whole then would be if the plant were new must be borne by usual methods. Age of the plant not a function of rate base.

Where value is based on original cost there is no depreciation while capacity remains unimpaired -

p 271 Base $7000000 rate of return 8 p.c. - [Land Co 6 Fed 2d 244]
"tangible" taken at their cost. Except land taken at present value. This case merely held the 8 p.c. rate confiscatory Affirmed 258/165 - p 171. Quotes Masters' finding that the rate was confiscatory to the basis of "actual investment" a very small if any return -

357. 358 - 365 - Cont'd

Ap 22 1925 - Con Gas Co v Prendergast. 6 Fed 2d 243.
This is suit to enjoin 8¢ rate prescribed by chap-
899. laws 1923. Held confiscatory - Return less
than 6 per Cent - Whatever the base taken as the
starting point

8 p.c. found reasonable.

#

Co for first time offered evidence of cost of reproduction
Dept offered no evidence on that subject, except as to Astoria
Tunnel. As to that Claims Company's estimate too
too high. "Defendants contended that investment
cost was the proper basis" -

P. 261 - Original cost. Dec 31. 1923 98. 917. 970 64
P. 262 Reproduction Cost " " " 159, 710 750. 73
P. 266. Present Value ~~134. 101 738. 77~~
129, 760 683 77

Accrued depreciation - Deducted the amount that
would be required to put the plant in Con-
dition equivalent to new. See 1 Fed 2d 365
Returns p. 271 & 272. =
PSC fixed rate of 8%

p. 273. Price levels discussed. Forecasts
p 275 Notes Judge Hand Plankopp Whole investment properly valued at 3000000 at present price or twice what I have valued it at.
Hand fixed a rate of 8 1/2 0 – P & C of 11% The act at 106
P. 278. As to Contract See 1 Fed 2d 375 [2]

Brooklyn Union case

~~7~~ June 1925 – Campbell J. 7 F. 2d 628 – 654 –
Depreciation. No deduction [15] 667

see 10 Fed 2d 167. N.Y. v Richmond Gas Co.